86-308

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
Term, 1986

ADAM G. NUNEZ,

Applicant,

-vs-

WAINOCO OIL & GAS COMPANY, TIDEWATER REALTY, INC., TIDEWATER BARGES, INC., WILSHIRE OIL & GAS COMPANY OF TEXAS, SOUTHERN CROSS LIMITED OF COLORADO, C.D.C. PRODUCING COMPANY, WILLIAMS EXPLORATION COMPANY, SOUTHPORT EXPLORATION INC., THE JOHN W. HECOM COMPANY, T. KEITH MARKS, DONALD F. TODD, CYNTHIA TODD HENDON, RONALD E. MARTIN, GUY V. LAND, REMUDA CORPORATION, LAWRENCE BARKER, JR., H. T. FREEMAN, Trustee, JOE RAMOS, Trustee, WILLIAM W. WILSON, Trustee, A. K. MITTELSTAEDT, Trustee, ROBERT E. MILLER, IRVIN POLLACK, JOHN C. KINARD, DAN W. WILLIAMS, ANDREW R. FISH, HARRY DERNICK, DERNICK RESOURCES, INC., MARINEX PETROLEUM COMPANY, ROGER AND COMPANY, WYNN & ASSOCIATES, EXCHANGE OIL & GAS CORPORATION, LEON COUNTY DEVELOPMENT COMPANY, INC., and CAMERON DEVELOPMENT COMPANY, INC., COMMISSIONER OF CONSERVATION OF THE STATE OF LOUISIANA

Respondants

APPEAL FROM THE SUPREME COURT OF LOUISIANA

JURISDICTIONAL STATEMENT

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EDITOR'S NOTE

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JURISDICTIONAL STATEMENT

A. QUESTIONS PRESENTED BY APPEAL

I.

Whether the acts of the Commissioner of Conservation, and the permit and amended permits and the Orders issued by the Commissioner, the manner, date and circumstances under which they were done - issued violates the 14th Amendment to the U. S. Constitution prohibiting the taking of property and/or property rights through retroactive-retrospective acts or law.

II.

Whether the Louisiana Conservation Statute, LSA R.S. 30:1 and following and The Mineral Code R.S. 31:1 and following as interpreted by the Supreme Court of Louisiana in this case is contrary to the 5th and 14th Amendments to the Constitution of the United States in that these statutes and/or said opinion of these statutes:

(1) Permit the taking of private property without due process of law and without compensation.

(2) Permit the exercise by an agency of the executive branch of the State Government, namely the Commissioner of Conservation, of police powers not specifically and expressly given to said agency as required by law.

(3) Permit the Commissioner to take private (or even public) property in contravention of the statute by which the agency is created and is authorized and directed to act, and in contravention of the 5th and 14th Amendments to the U. S. Constitution, in contravention of Article 1 Sec. 4 of the Louisiana Constitution and in contravention of all statutory and jurisprudential law existing before the decision of the Supreme Court of Louisiana in Nunez v. Wainoco et al.

III.

Whether Police Powers were proper and reasonable exercised by the Supreme Court of the State of Louisiana and/or the Commissioner of Conservation.

B. LIST OF ALL PARTIES TO THESE PROCEEDINGS

All parties are listed in the caption of the

case.

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D. OPINIONS BELOW

The opinion of the Supreme Court of the State of Louisiana, which is not yet reported, is attached as appendix A. Denial of rehearing is attached as Appendix A(1).

The opinion of the Court of Appeals-First Circuit is reported at 448 So2 955. It is attached as appendix B. Denial of rehearing is reported at --not reported. and is attached as appendix B (1).

The reasons for judgment and the judgment of the 19th Judicial District Court are unreported, but attached hereto as appendix C and C(1).

E. GROUNDS ON WHICH JURISDICTION INVOLVED

This is an appeal from the Supreme Court of the State of Louisiana (State Court of last resort).

The judgment of the Supreme Court was entered on May 20, 1986. A motion for rehearing was timely filed on May 30, 1986, but denied on June 19, 1986. Notice of appeal to

the Supreme Court of the United States was received by its Clerk of Court on July 15, 1986; to the Supreme Court of Louisiana was received by its Clerk of Court on July 15, 1986, to the Court of Appeals-First Circuit, Baton Rouge, LA was received by its Clerk of Court on July 11, 1986, and to the 19th Judicial District Court was received by its Clerk of Court on July 11, 1986.

Statutory provisions by which jurisdiction for this appeal is conferred on this Court are 28 U.S.C. 1257(2) and 28 U.S.C. 1257(1)--or, in the alternative, if the proper mode of review is by petition for certiorarity, is 28 U.S. C. 1257(3).

F. CITATION TO CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED --THE PERTINENT TEXT OF WHICH IS SET FORTH AS APPENDIX D.

U.S. Constitution, Amendments 5 and 14

Louisiana Constitution Article 1 Section 4

LSA R.S. 1:12
LSA C.C. 8
LSA R.S. 30:4
LSA R.S. 30:9
LSA R.S. 30:10
LSA R.S. 31:6
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LSA R.S. 31:15
LSA R.S. 31:164
LSA R.S. 31:166
LSA R.S. 31:177

G. STATEMENT OF THE CASE

This action involves subsurface drilling -trespassing by Wainoco Oil and Gas Co. et al into land owned by Adam G. Nunez after Nunez had expressly refused authority therefor.

It was originally filed in the 38th Judicial District Court in Cameron, Louisiana, as an action to recognize trespass, to cause the removal thereof and to enjoin reentry. However, as a result of dismissal by the 38th Judicial District Court of Cameron Parish on the grounds that plaintiff, Nunez, was collaterally attacking an order of the Commissioner of Conservation, a state agency of the Executive branch of Government, suit was filed in the 19th Judicial District Court in East Baton Rouge Parish, the domicile of the Commissioner as recognized by law, and the Commissioner was made a party defendant.

Before suit was filed, the Commissioner had improperly and in direct contravention of LSA R.S. 30:9(c), part of the statute directing the Commissioner's actions, created a drilling and production unit and issued a drilling permit to Wainoco, and later amended that permit to retroactively change a well applied for by Wainoco, permitted by the Commissioner and drilled by Wainoco as a

lease well to the unit well. This change occurred 33 days after trespass had occurred into Nunez unleased land. In further violation of the 14th Amendment and police powers the Commissioner very actively and adamantly participated in everything and at every stage of the proceedings through the Supreme Court of the State of Louisiana, always opposing the position of Nunez, and, in fact, (as admitted in Brief by all defendants, including the Commissioner), granting and/or issuing remedial orders and permits to defeat Nunez's cause of action even after suit was filed and after the Commissioner was made a party defendant in the suit.

These acts of the Commissioner and/or the effect given to these acts by the Supreme Court of Louisiana was to take property from Nunez, retroactively and/or at least without due process of law, and without compensation, in violation of the 5th and 14th Amendments to the U. S. Constitution (and in violation of the Constitution of Louisiana Article 1

Section 4 and in violation of all statutory and jurisprudential law of Louisiana. These acts likewise are in violation of the police powers of the state as recognized by the U.S. Supreme Court.

The 19th Judicial District Court in its reasons for judgment recognized that no authority had been granted for the trespass.

The Court of Appeals, First Circuit, rendered judgment recognizing that the Commissioner did not authorize sub-surface drilling-trespass into Nunez land and factually could not authorize the sub-surface drilling --trespass into Nunez land without Nunez's consent as the Commissioner had not been expressly and specifically authorized by statute (as required by Louisiana Law) to grant that authority. This judgment confirmed the Law of Louisiana that specific statutory authority must exist (but in fact did not exist) for the Commissioner to exercise police power, to take from the landowner his exclusive right to authorize drilling into

his land. The judgment of the Court of Appeals--First Circuit also confirmed the testimony of the State Agency--the Commissioner of Conservation of the State of Louisiana and/or the State of Louisiana (via Mr. Joe Hecker, tendered to Nunez by the Commissioner for deposition for and on behalf of the Commissioner and the State of Louisiana) wherein Mr. Hecker testified:

> There is no statutory authority authorizing Commissioner to authorize, permit, direct, whatever words, a well to be drilled surfacewise or sub-surfacewise into Nunez unleased property. (Hecker deposition p 368 -369 & 372)
>
> and
>
> "I don't know how many times I've said it, but I'll say it one more time, we didn't approve Wainoco to drill under your (Nunez) property". (Hecker deposition p 68)

The decision of the Supreme Court of Louisiana is to the effect that since and/or because established private property concepts such as trespass, have been superceded in part by Louisiana'a Conservation Law, and because (or as a result) of a unit being

created by order of the Commissioner, which he was authorized by statute to create, a legally actionable trespass did not occur in this instance. The Supreme Court of Louisiana did not even discuss the issue of whether or not authorization had been granted to Wainoco to drill subsurface--trespass into Nunez unleased land. Rather it based its decision on the fact that a unit was created and basically stated that once a unit is created, the driller of a well does not need anything else--apparently that the creation of a unit is synonamous with granting authority to drill where no authority otherwise exists.

(This of course is contrary to Louisiana statute R.S. 30:204F and Conservation Commissioner's Statewide Order 29B which requires securing authority in the form of a permit from the Commissioner before commencing drilling.)

The Court did not discuss Mr. Hecker's statements nor the decision of the Court of Appeals that the Commissioner did not and could not authorize subsurface drilling into

Nunez unleased land without Nunez's consent, because he had not been specifically and expressly granted that power as required by law as recognized by the Court of Appeals, but, rather, inferred that unitization alone accomplished all that is necessary. Nor did the Supreme Court discuss the protection guaranteed by the 5th and 14th Amendments to the U. S. Constitution, nor due process, nor compensation, nor retroactive laws, nor the provisions of the Conservation Statute, Mineral Code and Civil Code providing that the landowner has the exclusive right to drill into his own land nor the other things discussed in the brief by Nunez to that Supreme Court, nor the things contained in this Appeal--Jurisdictional Statement.

CONSTITUTIONAL QUESTIONS RAISED BELOW

Nunez complained of retroactive-retrospective acts of the Commissioner, calling same Ex Post Facto, when, in fact, Ex Post Facto pertains to criminal as contrasted to civil retroactive/retrospective law making.

The wrong term was used, as Nunez embarrassingly must acknowledge, however, the clear argument which was stated, together with the phrase Ex Post Facto, was but the criminal synonym of the civil words retroactive/ retrospective, acts of the Commissioner. Nunez begs this Honorable Court to so recognize and to consider this argument.

Petitioner, Nunez, complained of the retroactive-retrospective action of the Commissioner in paragraph 40 and 41 of his original petition. The acts done retroactively/retrospectively as of that time being the granting of the amended permit of December 8, 1980.

The Commissioner had created a drilling and production unit, but did not issue a permit to drill a unit well therein as provided by statute. Instead, in response to an application by Wainoco for a permit to drill a lease well, having nothing to do with the unit created, other than being located within the physical surface boundaries of the

unit, the Commissioner issued a permit to Wainoco to drill a lease well. After this lease well trespassed into Nunez unleased land during drilling operations, in response to an application by Wainoco, the Commissioner issued an amended permit to authorize the lease well to produce the unitized sand--supposedly, retroactively and in violation of LSA R.S. 30:9(c), making a unit well out of the lease well that had already trespassed, and thus supposedly providing it with the protection and authorization of unitization, which it did not have when it trespassed into Nunez land during drilling.

Petitioner, Nunez, filed a Supplemental and Amending Petition, mailing same to the 19th Judicial District Court on November 12, 1982, complaining of retroactive/retrospective actions of the Commissioner in paragraph 5, 8(B)(2), 8(B)(5), 8(B)(6), 8(B)(8), and 8(B)(12) and 9(D) and 9(E). By this time Wainoco had applied for and the Commissioner permitted the location of the Stone well to

its actual location as contrasted to the location where it was permitted before and during the actual drilling thereof. Also, by this time, Wainoco had applied for and the Commissioner issued Order No. 1095-B and 1016-B-3 confirming and continuing in effect the unit and the Stone well as the unit well. Order No. 1095-B and 1016-B-3 were admitted by defendants to have been for the purpose of defeating Nunez's cause of action.

Each of these permits and orders being law and/or having the effect of law were remedial, retroactive/retrospective curing of improper and/or illegal acts previously done.

Nunez briefed the retroactive-retrospective question in his Memorandum to the 19th Judicial District Court on page 3, paragraph numbered 8 and 9, on page 10, 12, 22, 25, 26-28 and 31-35; in his original brief to the Court of Appeals-First Circuit--see pages 28 and 29, 35 and following; in Nunez's Opposition to Granting of Writ of Certiorari or Review to reverse and set aside decision of

Court of Appeals, First Circuit rendered October 8, 1985, see page 56; and in Nunez's Opposition to Writ of Review of Decision of Court of Appeals-First Circuit, Parish of East Baton Rouge, see pages 12, 77 and 78.

The questions--the argument--the law relating to the retroactive/retrospective of the Commissioner were never considered by either of the State Courts or if considered, then not discussed in their Opinions.

DUE PROCESS AND POLICE POWER - 5TH AND 14TH AMENDMENT TO THE U. S. CONSTITUTION

Petitioner, Nunez, complained of the taking of private property without due process and just compensation as prohibited by the 5th and 14th Amendments to the U.S. Constitution, by Article 1, Section 4 of the Louisiana Constitution and all existing statutory and jurisprudential law and of improper use of police power by a state agency. This was done in paragraph 41 of his Petition, by paragraph 9 of Nunez's SUPPLEMENTAL AND AMENDING PETITION and by para-

graph 9(D), 9(E), 9(F) and 9(G) of Nunez's SECOND SUPPLEMENTAL AND AMENDING PETITION.

Nunez briefed or referred to due process and/or police power in his oral argument and his brief to the 19th Judicial District Court (the lowest court in which this matter was heard) in the "Law" section on pages 9 and 10 and briefed same on page 14, thereof. In Nunez's ORIGINAL BRIEF TO COURT OF APPEAL Nunez indicated these questions in the index to said brief on page 1, then discussed and cited jurisprudence and the constitutional provisions themselves on pages 7 and 8 and 14. And more specifically in that section entitled ASSIGNMENT OR SPECIFICATION OF ERRORS raised the due process and compensation questions citing both U.S. Constitution and Louisiana Constitution Articles.

In Nunez's ORIGINAL BRIEF to the Court of Appeals-First Circuit, in the index thereto on page 1 and on page 5, paragraph numbered 5, and in ASSIGNMENT OR SPECIFICATION OF ERRORS on pages 7 and 8 again raised the questions of

(C) and R.S. 30:10(A) the Louisiana statutes Wainoco et al alleged granted the Commissioner power to authorized trespass (as shown on pages 50 and 51) to show that said statutes did not confer that authority. In the Argument part of this Brief, and more particular, on pages 69 and 70, the Constitutional provisions and the Trunkline case were cited and quoted from to show that the statutory and jurisprudential law of Louisiana are but extensions of and confirmation of the Constitutional law cited, all providing that the Commissioner does not have the power to authorize drilling on private land without the landowner's consent. On page 101 through 107 Nunez briefed THE DECISION SOUGHT -- THE POSITION OF WAINOCO CANNOT BE SUSTAINED WITHOUT DESTROYING PUBLIC AND PRIVATE PROPERTY RIGHTS THAT ARE PROTECTED BY THE UNITED STATES AND LOUISIANA CONSTITUTIONS, STATUTORY AND JURISPRUDENTIAL LAW AND ON WHICH THIS GREAT NATION IS FOUNDED. On pages 127 and 128 of

said brief, Nunez touched on EMINENT DOMAIN -- EXPROPRIATION V POLICE POWER.

Nunez raised the question of police powers and the reasonable--proper use of police powers by the State and/or a state agency--the Commissioner of Conservation of the State of Louisiana in his SECOND SUPPLEMENTAL AND AMENDING PETITION, paragraph 5, 8(B), 9(C), 9(D), 9(E), 9(F); in his SUPPLEMENTAL AND AMENDING PETITION, paragraph 9, 10, 41 and paragraph 6 and 7 of the Prayer thereof. In Nunez's MEMORANDUM to the 19th Judicial District Court, paragraph numbered 5 on page 3 and following Nunez sets forth the facts showing improper acts of the Commissioner, and on page 3 paragraph 10 through paragraph 13 and and on page 4 and on pages 20 and 21 and 26 and 33 Nunez shows acts of the Commissioner that are contra to the Louisiana statute providing for unitization and permitting of wells, which makes his acts contra to the granting to and exercise of police power by the State of Louisiana and/or State agencies.

In Nunez's Original Brief to the Court of Appeals-First Circuit, on page 5 paragraph numbered 4 the question is raised as to whether the Commissioner followed statutory law that directs how the Commissioner is to create drilling units and permit wells. Question No. 4 on page 5 raises the question of "did the entity that granted authority to drill subsurface into Nunez land act properly in granting that authority and did it follow the statute or law of the state of Louisiana that directs how it is to grant that authority." Page 37 and 38 of this brief discusses the fact that the Commissioner did not follow R.S. 30:9(C). In Nunez's reply brief to this Court of Appeals, First Circuit, in the index thereof and on page 20, is covered:

COMMISSIONER OF CONSERVATION DID NOT COMPLY WITH R.S. 30:9(C) WHEN HE CREATED THE LOWER ABBEVILLE A SAND UNIT F, NOR WHEN HE ISSUED PERMITS TO DRILL THEREIN. COMMISSIONER DID NOT DESIGNATE UNIT WELL LOCATION NOR/AND THUS

DID NOT AND COULD NOT PERMIT THE UNIT WELL.

Nunez sufficiently raised the constitutional questions from the Original Petition filed in the 19th Judicial District Court through the Court of Appeals--First Circuit to the Supreme Court of the State of Louisiana (State court of last resort). The 19th Judicial District Court, in its ORAL REASONS FOR JUDGMENT stated that the Commissioner had not exceeded its considerable authority, that the drilling permit did not authorize the well to be bottomed under Nunez land, that the Court would be hard pressed to find that there was no trespass, but that removal of the well would not be directed because it would be impracticable and completely unreasonable--Nunez's action was limited to one in damages. Summary Judgment was directed for the Commissioner (which was appealed by Nunez through the Supreme Court).

Even though the Commissioner did not comply with R.S. 30:9(C) which directs the manner in which same must be done the Court of

Appeals--First Circuit approved the Commissioner's creation of the unit and the permitting of the well and changing of the well from a lease well to the unit well after the trespass occurred relying on the doctrine of contemporaneous construction, long period of action without opposition and without showing that acts are wrong or a different construction is plainly required or that the acts were arbitrary and capricious. The Court of Appeals further recognized that the Commissioner was authorized by statute to (and thus had properly) issue unitization order and to designate a unit well thereon, however, that no where in the legislature's grant of authority to the Commissioner is there the necessary express provision allowing the Commissioner to authorize drilling on or under unleased property without the authorization or consent of the landowner--that it is basic to Louisiana Law that an owner of land may use, enjoy and dispose of his land and everything above and

below it, restrained only by explicit and specific laws and rights of others; that the right to permit entry on land to explore for oil, gas, or other minerals is a valuable property right belonging exclusively to the landowner; That the Commission did not authorize anyone to drill on or under unleased land without the owners consent because the Commissioner's power to infringe on the property rights of landowners is restricted to those things specifically authorized by Louisiana Law, and the Commissioner had not been specifically granted that power by statute.

The Supreme Court of Louisiana held that the recent enactments of title 30 and 31 (of the Revised Statutes of Louisiana) supercedes Civil Code Article 490 general concept of ownership of the subsurface by the surface owner of the land and thus when a unit is created by the Commissioner, a landowner loses his exclusive right to authorize or prohibit drilling into his land, and thus drilling into

the landowners property without the consent of the landowner is not a legally actionable trespass. In effect, the court stated that authority or permits, as required by Title 30 and 31 of the La. Revised Statutes, are not necessary. Once the unit is created, the driller-operator can drill anywhere it elects within that unit. The Court did not consider or discuss the fact that even though there is specific and express statutory authority for the Commissioner to create units and to require a sharing of production by all landowners within the unit -(see R.S. 30:4, 30:9, and 30:10) there is no specific and express statutory authority for any entity other than the landowner to authorize drilling into the landowner's land--a fact or law clearly and expressly stated by the Court of Appeals-First Circuit and clearly contemplated by the 5th and 14th Amendments to the United States Constitution and Article 1 Section 4 of the Louisiana Constitution and by all of the statutory and jurisprudential law existing

before the decision of the Supreme Court. Due process, compensation, the exercise of only the specific police powers expressly and specifically given by statute or Constitution was not even discussed. Nor did the Court consider the retrospective-retroactive changing of the well applied for by Wainoco, permitted by the State and drilled by Wainoco as a lease well to the unit well 33 days after the trespass occured. Nor did the Supreme Court consider that the Commissioner and the State of Louisiana testified via Mr. Joe Hecker that:

> "I don't know how many times I've said it but I'll say it one more time, we didn't approve Wainoco to drill under your property" (see page 68 of First Volume of Hecker's deposition)

and

> "There is no statutory authority authorizing Commissioner of Conservation to authorize, permit, direct, whatever words, a well to be drilled surfacewise or subsurfacewise into Nunez unleased property." (Deposition of Hecker p 368-369, 372).

H. THE QUESTIONS PRESENTED IN THIS APPEAL ARE SO SUBSTANTIAL AS TO REQUIRE A PLENERY CONSIDERATION FOR THE FOLLOWING REASONS:

1. If the decision of the Supreme Court of Louisiana is not reversed private property will be taken from Adam G. Nunez without due process of law or compensation and in violation of the provisions of the 5th and 14th Amendments to the U.S. Constitution (and actually in violation of Article 1 Section 4 of the Constitution of Louisiana, and all statutory and Jurisprudential law of Louisiana).

2. This is the first time that the question of whether a state, in the exercise of its police powers (and by an unauthorized state agency) can authorize subsurface drilling into land after the landowner has refused to consent.

3. The decision of the Louisiana Supreme Court, if allowed to stand, will approve and authorize a state agency to exercise powers not specifically and expressly granted to it;

to use those powers retroactively-retrospectively; to take vested property rights, and to defeat or cause to not exist a cause of action that existed before the state agencies acts.

4. The decision of the Supreme Court, if allowed to stand, will permit the Commissioner of Conservation, a state agency, to act contrary to specific statute directing his actions, and in disregarding the statute to establish procedure opposite to the statute.

BRIEF-ARGUMENT

Governmental agencies can exercise police powers, but only when and as that authority is specifically and expressly granted by the legislature. This concept was clearly recognized by the Court of Appeals-First Circuit in Nunez v Wainoco et al when it clearly and beautifully stated the entire concept thusly:

> The forced pooling converts various separate interests into a common interest as far as development of a unit and the drilling of the unit well are concerned. Mire v Hawkins 249 La 278, 186 So2d 591 (La 1966).

Under forced pooling, owners of tracts within the drilling unit must pool their interests for the purpose of development, and a well drilled on any tract within the unit is considered as having been drilled upon each separate owner's tract. LSA-R.S. 30:10[1] Individual tract owner thus lose the right to search independently for oil and gas under their land. Such forced pooling has been deemed to be a constitutionally valid exercise of the state's police power. Alexander v Holt, 116 So2d 532 (La. App. 2d Cir. 1959)[2]

Nowhere in the legislature's grant of authority to the commissioner is there an express provision allowing him to authorize drilling on or under unleased property without the authorization or consent of the landowner.

It is basic to Louisiana law that an owner of land may use, enjoy and dispose of that land and its fruits, including everything directly above or under it, restrained only by explicit and specific laws and rights of others. La. Civ. Code arts. 477, 483, 490. The right to permit entry on land to explore for oil, gas, or other minerals is a valuable property right belonging exclusively to the landowner. Picous v Fohs Oil Co. 22 La. 1068, 64 So2d 434 (La. 1953); Franklin v. Arkansas Fuel

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[1]Footnote inserted by Nunez. Notice the statutory authority therefore is specifically cited.

[2]Footnote inserted by Nunez. Statutory authority therefor is specifically provided for by LSA-R.S. 30:9(B)

Oil Co., 213 La. 987, 51 So2d 600 (La. 1951); Angelloz v Humble Oil and Refining Co., 196 La. 604, 199 So2d 656 (La. 1941). A landowner states a cause of action when he claims a subsurface trespass by a party whose well is bottomed on the plaintiff's property. Gliptis v Fifteen Oil Co., 204 La. 894, 16 So2d 471 (La. 1944) See also, LSA-R.S. 31:12, 14.

In the case before us, the commissioner included plaintiff's property in the drilling unit. This was within his powers. He authorized a five degree deviation from the vertical in drilling downward. This, too, was within his powers. The Commissioner's order did not authorize and could not authorize anyone to drill on or under unleased land where there was no permission from the owner of the unleased land. The order lacked that authorization because the commissioner lacked the power to give that authorization. His power to infringe on the property rights of landowners is restricted to those things specifically authorized by Louisiana law. Authorizing oil exploration on land without the landowner's permission is not a power specifically given in the statutes.

If a well is drilled within the commissioner's specifications, as this one appears to have been, it remains an approved unit well. If in drilling this well, the unit operator enters onto or drills under property in or out of the unit without permission from the owner of the land, the operator has committed a trespass.[2] If in bad faith, the trespasser is bound to remove the encroachment and pay damages. Esnard v Cangelosi, 200 La. 703, 8 So2d 673 (La. 1942); Barker v Houssiere, Latreille Oil Co., 160 La. 52, 106 So. 672 (La. 1925); Bushnell v. Artis, 445 So2d 152 (La. App.

3d Cir. 1984).

There are no "reasonable statutory restrictions" in the law of the State of Louisiana that restricts the landowners exclusive rights to use or authorize use of-drilling into-the landowner's property. All law (especially the Mineral Code and Civil Code Articles) except the decision of the Louisiana Supreme Court in Nunez v Wainoco recognizes the landowners exclusive right to control drilling into the landowner's property.

Likewise, in Nunez v Wainoco there is no "reasonable exercise of the police power", as by law the Commissioner can exercise only the power specifically and expressly granted to the Commissioner, while, in fact, the Commissioner exceeded the statutory authority granted to him.

Thus, by limitation, if the Commissioner exceeds the specific and express authority that has been expressly and specifically granted to the Commissioner by the statute

that creates and directs that agency, he acts arbitrarily and capriciously and contra to and in violation of the 5th and 14th Amendments to the Constitution of the U. S. and contra to and in violation of the statutes and jurisprudence of the U.S. and of Louisiana. In the matter at hand the Commissioner exceeded his authority:

First: Though the Commissioner of Conservation is specifically and expressly authorized to create drilling and production units and to permit wells to be drilled therein, (but not authorize drilling on land of a non-consenting landowner), and though the manner in which said power is to be exercised is specifically and expressly provided for, the Commissioner did not follow the statute which mandates that process. Once the Commissioner failed and refused to follow the conservation statute he exceeded his authority and the police power as established by LSA R.S. 30:1 and following in violation of the 5th and 14th Amendments to the U.S.

Constitution.

LSA R.S. 30:9(C), that part of the Louisiana Conservation Act directs the Commissioner to permit well before a well can be drilled, provides:

> Each well permitted to be drilled upon a drilling unit hereafter established shall be drilled at the location designated by the Commissioner of Conservation after public hearing in the order creating the unit. The Commissioner shall consider all available geological and engineering evidence and shall provide for the unit well to be located at the optimum position in the drilling unit for the most efficient and economic drainage of such unit... LSA R.S. 30:9(C)

This is mandatory language that must be strictly complied with for validity of the acts of the Commissioner relating to the permitting of a well. But the Commissioner did not comply with this LSA R.S. 30:9(c).

To begin with, the well was not drilled by Wainoco at the location stated in Wainoco's application for permit, nor at the location for which the Commissioner issued the permit, even if the Commissioner did designate the location. Instead, it was drilled from/at the location

shown in the amended permit issued in February 1985--15 months after the trespass occurred on November 5, 1980. Mr. Hecker clearly so testified:

> The Stone well was not drilled at the location applied for nor permitted and it was moved without authority (Mr. Hecker's deposition pages 79, 82, 85-88)

Factually, and actually, the Commissioner simply issued the original permit of September 23, 1980 and the amended permit of February 1982 <u>at the location selected and applied for by Wainoco.</u> This is in direct conflict with R.S. 30:9(c) which requires that the well be permitted.

> "...at the location designated by the <u>Commissioner</u>..."

<u>Wainoco designated</u> the location--the Commissioner simply issued the permit where Wainoco designated--where Wainoco fixed the location in its application for permit to drill.

As clearly acknowledged by the Commissioner through the deposition of Mr. Joe Hecker:

"Applicant (Wainoco) applies for location of well. The Commissioner does not designate." (see Hecker Deposition pages 94, 96, 98, 99, 118)

"Order 1016-B-2 did not direct well location--simply said comply with 29E and 29B (spacing and directional survey) (see Hecker Deposition pages 97, 99)

Conservation Commissioner designates the unit and then producer selected the drill site within the unit. (see Hecker Deposition page 302)

This permitting by the Commissioner--the State Agency of Wainoco, the private corporation, to designate the well location 20 feet from Nunez unleased land--a location from which it must have been obvious that and from which the well did deviate into Nunez land subsurface, is in direct violation of established jurisprudence that neither the State legislature nor any inferior legislative body, nor State commission to which a portion of the police power has been granted can alienate, surrender or abridge the right to exercise such power by any grant, contract or delegation whatsoever. Home Building & Loan Association v Blaisdell 54 S Ct 231, 290 US 398, 78 L Ed

413, 88 ALR 1481.

Further, the Commissioner did not have a public hearing concerning the permitting of the Stone well, as required by R.S. 30:9(c) which requires:

> "Each well permitted--should be drilled at the location designated by the Commissioner of Conservation, after public hearing..." R.S. 30:9(c)

Instead, and as candidly admitted by Mr. Joe Hecker in his deposition;

> Commissioner did not hold a public hearing relating to the application for granting of the permit to drill issued September 23, 1980. (Hecker deposition pages 8, 9, 90). Nor for issuing amended permits (Hecker deposition page 92)
>
> Q."But I'm still trying to get to the permits to whether or not a hearing was held for each permit or amended permit or if the permit was issued in an order creating a unit."

A. "Mr. Nunez, we don't have hearings to issue permits and we don't issue orders for permits."

Q. So then your answer would be No.

A. Yes sir.

(Hecker deposition page 93)

When order 1095 and 1016-B-2 was signed (July 1980) and was effective (May 20, 1980) --i.e. when the unit was created --(which was confirmed and continued on June 8, 1982) there was no well in existence, nor even a permit applied for (Hecker's deposition page 387)

> In order creating unit in which the Stone well was drilled, no unit well was named. (Hecker deposition page 227)

Factually, the original permit and the amending permits were issued by the Commissioner in response to the application by Wainoco and as recommended by the Lake Charles District Manager, Mr. Wilhite, who never attended a meeting, nor ever considered any geological or engineering information. The permit and the amending permits were issued arbitrarily in the daily shuffle of papers, months after the unitization order.

Further, the Commissioner did <u>not</u> permit the well or designate the specific location of the well as required by R.S. 30:9(c):

"...in the order creating the unit".

Mr. Hecker clearly and candidly admitted this. He states:

> In order creating unit in which the Stone well was drilled, no unit well was named. (see Hecker's deposition page 227)
>
> When the office of Conservation has created undrilled units without proposed locations on them, the

> Commissioner does not normally designate the location of the unit well in any manner other than by employing Statewide Order 29E or special spacing provisions. (Heckers Deposition pages 230, 231, 228-229)

Finding 6 of Conservation Commissioner Order 1095 and 1016-B-2 stated:

> "That unit well for Lower Abbeville A RA SUF should be located in compliance with the provisions of Statewide Order 29E"
> (Note: No specific location designated as required by R.S. 30:9(c))

The fact that the order does not contain the permit in the order is made abundantly and adamantly clear by reading order 1095 and 1016-B-2 issued July 8, 1980, effective May 20, 1980, and the only permit ever issued--the permit of September 23, 1980--the permit being issued over two months after the order creating the unit. The amending permits were issued three months and sixteen months respectively after the order.

Clearly, the Commissioner did not comply with the Statute providing the manner in which the Commissioner must exercise whatever police power has been delegated to him.

Likewise, by the clear language of R.S. 30:9(c) the lease well cannot be changed into a unit well because it was not permitted as the unit well as provided by R.S. 30:9(c). R.S. 30:9(c) requires--it states that:

> "Each well permitted to be drilled upon a drilling unit shall be drilled at the location designated by the Commissioner, after public hearing in the order creating the unit.

For the well to be drilled upon a drilling unit--that is, for the well to be a unit well --it must be permitted as required by R.S. 30:9(c)--it must be permitted and drilled at the location designated in the order creating the unit--that is Order 1095, 1016-B-2.

Second: The Commissioner consorted with Wainoco to deprive Nunez of the rights guaranteed by the 5th and 14th Amendments to the U.S. Constitution, by Article 1 Section 4 of the La. Constitution and by the legislative acts of the U.S. and of Louisiana, and the jurisprudence thereof. Each of these provide

for and protect the property rights of the individual/landowner. The La. Acts creating the Conservation Commission and the Office of the Commissioner require the Commissioner to protect the landowner as well as to conserve the natural resources.

However, instead of protecting the private property rights of Nunez, the Commissioner filed responsive pleadings, filed its own briefs and joined in other briefs, prepared and filed affidavits, issued and confirmed orders authorizing the taking of Nunez property--drilling rights--without due process and without compensation, in retrospective-retroactive manner even after suit was filed, argued in Court against Nunez's action, permitted acts of Wainoco controvening U.S. and Louisiana law, and generally did anything and everything possible to favor Wainoco, a <u>private</u> entity-corporation over the landowner who is supposed to be protected by the 5th and 14th Amendments to the U.S. Constitution, Article 1, Section 4 of

the La. Constitution and the statutory and jurisprudential law of this great land. This is contra to the requirement that police power can be used only for public (as contrasted to private) benefit and/or purposes.

Third: The Commissioner even violated its own rules. Statewide Orders 29-B and 29-E require that the well location be over 330 ft. from property lines. The Commissioner issued to Wainoco a permit to drill the Stone well as a lease well only 20 ft. from the boundary/property line of Nunez's unleased property, assumingly with the knowledge that unless Wainoco controlled the direction of the well bore, subsurface drilling--trespass would occur into Nunez unleased land--all in violation of the 5th and 14th Amendments to the U.S. Constitution, Article 1 Section 4 of the La. Constitution and the statutory and jurisprudential law then existing.

The Supreme Court of Louisiana approved the violation of the rights guaranteed to the landowner, Nunez, by the United States and

Louisiana Constitution, the statutory and jurisprudential law. It pronounced the broad concept of Louisiana's Conservation Law superceding established private property law concepts. The Supreme Court of Louisiana did not, however, because it could not, cite the specific and express law that authorized the Commissioner to authorize drilling subsurface--trespass into land without the owners consent, simply because such authority does not exist. The concept may be great, but without authority for that concept, and especially when that concept is contra the 5th and 14th Amendment to the United States Constitution, Article 1, Section 4 of the Louisiana Constitution and all statutory and jurisprudential law are all opposite, the taking of private property as was done takes from Nunez the private property rights guaranteed to Nunez by the 5th and 14th Amendment to the United States Constitution, Article 1 Section 4 of the Louisiana Constitution and statutory and jurisprudential law.

DUE PROCESS AND COMPENSATION - 14TH AMENDMENT v POLICE POWER

Though there is reserved to the State in the form of Police Power, the right to regulate and control the use of private property for the general welfare, the State, under the police power, cannot, in any manner actually take and appropriate property for public use without compensation, for such action is repugnant to the constitutional guarantee that where private property is appropriated for public use, the owner shall receive reasonable compensation. (see

> Delaware L & WR Co. v. Morristown, 276 US 182, 72 L Ed 523, 48 S Ct 276, 56 ALR 756; Chicago B & O R Co. v Illinois, 200 US 561, 50 L Ed 596, 26 S Ct 341; Sweet v Rechel 157 US 350, 40 L Ed 188, 16 S Ct 43, Hessey v Capital Transit Co., 193 Md 265, 66 A3d 787, 10 ALR 2d 1114; Phillips Petroleum Co. v Omaha 171 Neb 457, 106 NW 2d 727, 85 ALR 2d 570; Eggebeen v Sonnenberg 239 Wis 213, 1 NW 2d 84, 138 ALR 495.

Likewise, the State cannot take property or property rights from Nunez and give same to another entity.

Purchase v Laboree, 2 Me 275; Booth v Hariston, 193 NC 278, 136 SE 879, 57 ALR 1186, reh den 195 NC 8, 141 SE 480, 57 SLR 1196; Boehmer v Kalk, 155 Wis 156 144 NW 182.

Taking away one man's property and giving it to another without due process of law is beyond the sphere of the legislative authority of both states and nation. Osborn v. Nicholson, 80 US 654, 20 L. Ed 689.

A legislative act which provides for an involuntary transfer of property from one person to another without due process of law, whether with or without compensation, violates the principles of the fundamental law. Gilman v Tucker, 128 NY 190, 28 NE 1040.

The legislature cannot, in view of constitutional limitations, take any portion of a vested property right from one person and invest another with it. Fall River Valley Irrig. Dist. v. Mt. Shasta Power Corp., 202 Cal 56, 259 P 444, 56 ALR 264.

The term "property" in its strict legal sense means the right of dominion or indefinite right of user and disposition which one may lawfully exercise over land. O'Connor v Moscow, 69 Idaho 37, 202 P2d 401 9 ALR 2d 1031; Metropolitan Fruit Co. v Jones, 384 Ill 248, 51 NE2d 256, 149 ALR 1416.

Any taking of property by the state or

more specific, in the case at hand, the right not to have a well trespass into and the pipe remain in Nunez's land forever if this Honorable Court does not direct its removal, at least after production ceases and the purpose for which it was placed into Nunez land initially finally does terminate and the giving of that property to Wainoco, or even reserving same for the state and its inhabitants is in violation of the due process clause of the 14th and 5th Amendments (see

> North Georgia Finishing, Inc. v. Di-Chem Inc., 419 US 601, 42 L Ed 2d 751, 95 S Ct 719; Fuentes v Shevin, 407 US 67, 32 L Ed2d 556, 92 S Ct 1983, 10 UCCRS 913, reh den 409 US 902, 34 L Ed 2d 165, 93 S Ct 177)

The duration of the taking is of course important (see Mackey v Montrym (US) 61 L Ed 2d 321, 99 S Ct.) In the matter at hand, though the well has stopped producing, or will stop producing in the immediate future, the taking and/or the trespass will exist forever unless Wainoco is directed to remove the pipe --the trespass from Nunez land.

This is contra to the 14th and 5th Amendments as where the necessity of the interference with, or the appropriation of, private property under the police power passes away, the right to interfere with or appropriate it ceases (see House v Los Angeles County Food Control Dist. 25 Cal. 2d 384, 153 P2d 950.)

RETROSPECTVIE-RETROACTIVE EFFECT OF COMMISSIONERS ACTS VIOLATED DUE PROCESS

Wainoco applied for a permit to drill a lease well on the Stone land, the Commissioner issued a permit to drill a lease well on Stone land, and then Wainoco drilled a lease well. 33 days after this lease well trespassed into Nunez land Wainoco applied for and the Commissioner issued an amended permit changing the lease well to the unit well. Wainoco's defense and apparently the Supreme Court's judgment was based on retroactive-retrospective effect of changing the lease well into the unit well even though the trespass complained of occurred while the Stone well was a lease well and as of that point in time "rights" or

wrongs--the trespass--and the remedy--the right to have the trespass removed had "vested." Everything else but the alleged intent of Wainoco proved the well to be a lease well, "...not subject to, not controlled by, and not governed by any order" relating to the unit created" --it had no unit and the Commissioner had not recognized it as any unit well--just the drilling of a lease well". (Quotes from Hecker Deposition for Commissioner and State of Louisiana).

Though there is no express constitutional language that prohibits retrospective-retroactive laws, it has been held by the Courts of various states and the U. S. Supreme Court

> Winther v Weippe 91 Idaho 798, 430 P.2d 680, Hollen v Minneapolis-St.Paul Metropolitan Airports Comm. 250 Minn. 130, 84 NW 2d 282; Moore v McDuff 309 NY 35, 127 NE 2d 741, Day v Mruk, 307 NY 349, 121 NE 2d 362, Ostrander v Preece, 129 Ohio St. 625, 3 Ohio Ops 24, 196 NE 670, 103 ALR 218, app dismd. 296 U.S. 543, 80 L Ed 386, 565 Ct. 151)

that retrospective legislation is prohibited under the 14th Amendment when it divests any private vested right or interest.

Further, despite the broad scope of the police power, it is always subject to the rule that the legislature may not exercise any power that is expressly or implicitly forbidden to it by the law of the state.

> Constatin v Smith D.C. Tex 57 F 2d 277, appeal dismissed, Sterling v Constantin 53 S CT 190, 287, US 378, 77 LE d 375, Harlow v Tyland, D.C. Ark 78 F. Supp. 483, affirmed C.A. 172 F 2d 784 - U.S. v Renken, D.C. S.C. 55 F Supp 1, affirmed. Old Monstery Co v US CCA 147 F 2d 905 Cert. den. 66 S Ct 44, 326 US 734 90 L Ld 437, Alliance Trust Co. v Hall, D.C. Idaho 5 F. Supp 285, Indiana Refining Co. v Ambraw River Drainage Dist. D.C. III IF Supp 937; Schwegman Bros. v Louisiana Board of Alcholic Beverage Control 43 So2d 248, 216 La 148, 14 ALR 2d 680.

The Law of Louisiana provides:

LSA CC 8-

> "A law can be prescribed only for the future; it can have no retroactive operation, nor can it impair the obligation of contracts."

and LSA R.S. 1:2 -

> "No section of the Revised Statutes is retroactive unless it is expressly so stated."

The Statute creating and directing the Conservation Commission and its acts, LSA R.S. 30:1 and following is part of the Revised

Statutes of Louisiana.

When the Commissioner permitted the Stone well as a lease well, by Louisiana law, that permit was the law and/or fulfilled the law insofar as that well and the permit were concerned at least to the extent that the permit itself was legal and proper. When the Commissioner issued the amended permit to drill, thus changing the lease well to the unit well, as applied for by Wainoco after Wainoco had trespassed, the Commissioner created--issued--directed retroactive law or orders that Wainoco maintains and the Louisiana Supreme Court apparently determined had the effect to somehow void the trespass that had already occurred, and/or retrospectively--retroactively approve the drilling of the Stone well as a unit well as contrasted to a lease well as it was permitted when the trespass occurred.

This retroactive-retrospective act of the Commissioner, who was never authorized to so act, was not in accordance with, but

rather was in violation of due process of law guaranteed by the 5th and 14th Amendments, and the U.S. Supreme Court judgments that recognize that retrospective legislation is prohibited under the 14th Amendment when it divests any private vested right or interest, the rights being property rights and to have the trespass removed as of the instant of trespass rather than the right thwarthed by curing through retrospective-retroactive law-permits and orders.

Further it has been held by the U.S. Supreme Court that even if the law--the act of the Commissioner--is intended merely to effect changes as to remedy and procedure, if it impairs vested rights it is invalid. (see

> Downs v Blount, CCA 5 Tex.) 170 F 15, Cert. denied, 226 US 609, 57 LEd 380, 33 S Ct. 216, Jenkins v Jenkins 219 Ark. 919, 242 SW2d 124, 27 ALR 861, Grinder v Nelson CMD) 9 Gill 299; Holen v Medford (Mass) 73 NE 1070; Busnell v Loomis, 234 Mo. 371, 137 SW 257, Blakemore v Cooper 15 ND5, 105 NW 566, Gladney v Sydner 172 MO 318, 72 SW 554.

Our U.S. Supreme Court has further spoken in the following terms, directly applicable to

to the vested property rights of Nunez, the right Nunez has to have the trespass removed once it wrongfully occurs, rather than retro-active-retrospective curing, and the unconstitutionally of taking of Nunez's vested rights:

> Statutes retrospective in their character and operation, directly affecting and divesting vested rights are very generally considered as founded on unconstitutional principles and consequently inoperative and void. (see Memphis v U.S. 79 U.S. 293, 24 LEd 940; Mott v Helmes 246 Ala. 331, 20 So2d 461, Titus v Titus, 96 Colo. 191, 41 P2d 244; People ex rel Fitzgerald v Still, 280 Ill. 553, 117 NE 784; Beeler v Campbell v Warren 151 Kan. 775; 100 P2d 700, Ross v Worthington 11 Minn. 438; Lowe v Harris 112 NC 472; 17 SE 539; Gerdner v Stephens 48 Tenn. 280)
> and
> (see Wilson v Leland 27 U.S. 627, 7 LEd 542; Davis & McMillan v Industrial Acci. Com. 198 Cal. 631, 246 P 1046, 46 ALR 1095; Teralta Land & Water Co. v. Shaffer, 116 Cal. 518, 48 P 613; People ex rel Eitel Lindheimer 371 I 11 367, 21 NE 2d 318, 124 ALR 1472, app. dismd. 308 U.S. 505, 84 LEd 432, 60 S. Ct 111; Sears v Chicago 247 I 11 204, 93 NE 158; Conway v Cable 27 Ill 82; Windsor v Des Moines, 110 Iowa 175, 81 NW 476; Darlington v Board of Councilmen, 282 Ky. 778, 140 SW 2d 392; Proprietors of Kennebec Purchase v Laboroe , 2 Me 275; Ramey v State 296 Mich. 449, 296; City Bank Farmers' Trust Co. v New York C.R. Co. 253 NY 49, 170 NE 489, 69 ALR 940;

Re Pell's Estate, 171 NY 48, 63 NE 789; Lowe V Harris 112 NC 472, 17 SE 539; National Bank of Commerce v Jones, 18 Okla 555, 91 P 191; Templeton v Linn County, 22 Or 313, 29 P 795; Merchants Bank of Danville v Ballou, 98 Va 112, 32 SE 481; Danville v Pace, 66 Va 1; Hall v Burns, 113 W Va 820, 169 SE 522.

The concept of "confiscation"--the taking without due process--is opposed to the due process clause of the 5th and 14th Amendments.

Zschernig v. Miller, 389 US 429, 19 L Ed 2d 638, 88 S Ct 664, reh den 390 US 974, 19 L Ed 2d 1196, 88 S Ct 1018.

A law and/or acts of the state or any of its branches or departments, is considered as being a deprivation of property within the meaning of the 5th and 14th Amendments if they deprive an owner of one (either) of its' attributes.

Indian Refining Co. v Ambraw River Drainage Dist. (DC Ill) 1 F Supp 937; Capital Gas & Electric Co. v Boynton, 137 Kan 717, 22 P2d 958, cert dismd 292 US 601, 78 L Ed 1464, 54 S Ct 639; State v Johnson (Me) 265 A2d 711, 46 ALR3d 1414; State v Julew, 129 Mo 163, 31 SW 781; Henderson v Greenwood, 172 SC 16, 172 SE 689; Gaertner v Stolle (Tex Civ App) 238 SW 252, writ ref; Bountiful City v De Luca 77 Utah 107, 292 P 194, 72 ALR 657; Inman v Sandvig,

170 Wash 112, 15 P2d 696.

> It is not necessary, in order to render a statute vulnerable from a constitutional viewpoint, that it in terms of or in effect authorize actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment or the power of disposition at the will of the owner. Arverne Bay Const. Co. v Thatcher 278 NY 222, 15 NE 2d 587, 117 ALR 1110, Headley v Rochester , 272 NY 197, 5 NE2d 198; People ex rel McKpike v Van DeCarr, 178 NY 425, 70 NE 965.

IF THE COMMISSIONER OF CONSERVATION DID NOT VIOLATE THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION THEN THE LOUISIANA SUPREME COURT DID

It has been affirmed by the U. S. Supreme Court

> (see Devon Corp. v. Miller 280 SE2d 108, rehearing denied, centiorari denied 102 S Ct 1622, 455 US 993, 71 L Ed 3 855)

that a state may require drillers of wells to obtain the consent of the owners of the property. The Louisiana Constitution, Article 1, Section 4, all statutory law applicable to the subject, including, but limited to: LSA CC 490, 477, 483, 526, and LSA R.S. 30:21, 31:6, 31:8, 31:10, 31:13, 13:14, 13:15, 31:64; 31:166, 31:177 and all jurisprudence existing

prior to the decision of the Louisiana Supreme Court in Nunez v Wainoco, including but not limited to:

> Cliptis et al v Fifteen Oil Co., 16 So. 2 471, 1943, S. Ct., Allis Oil Co. v Ayres 92 So 720; Layne La. Co. v Superior Oil Co. 209 La. 1014, 26 So.2 20; Picou v Fohns Oil Co. 64 So2 434; Jones v First National Bank, Ruston, LA 41 So2 811; Dubois v Hardin, 13 Orleans App. 210; Angelloz v Humble Oil & Refining Co. 196 La. 604, 199 So. 656; Mt. Forest Fur Farms of America v Cockrell, 115 So.229; Winple v Nabors Oil & Gas Co., 97 So. 666; Long Bell Petroleum Co. v Tritico, 43 So.2 782; Franklin v Arkansas Fuel Oil Co., 51 So2 600; Holcombe v Superior Oil Co. 213 La. 684, 35 So2 457; Gulf Refining Co. of La. v Glassel, 186 La. 190, 171 So. 846; Lilly v Conservation Commissioner of Louisiana, 29 F Supp 892; Strother v Mangham, 70 So 426; McCoy v Arkansas Natural Gas Co. 143 So. 383, 85 ALR 1147. Cert. denied 53 S Ct 200, 287 US 661, 77 L Ed 570; D. Moss v Sample, 78 So. 482; Dixon V American Liberty Oil Co. 77 So2 533

clearly recognizes that the landowner is the only person--entity that can authorize drilling into his property. There are no constitutional provision, no statutes, no jurisprudential statements that expressly and specifically provide otherwise. If there were, certainly Wainoco and the other defendants would have

cited same to the lower courts and would cite same to this court in an opposition to this appeal. To the contrary, the State and the Commissioner admitted via the deposition of Joe Hecker that the State does not have the power to authorize drilling into privately owned land without the landowners consent, and that authorization was not granted.

Absent specific and express statutory authority granted to the state agency, or to the court, the right to authorize drilling into private property is vested exclusively in the landowner and the taking of that vested right by any governmental entity, court included, is prohibited by the 14th and 5th Amendments.

Buchaher v New York, 319 US 427, 87 L Ed 1492, 63 S Ct. 1129; Brinkerhoff-Faris Trust & Savings Co. v Hill, 281 US 673, 74 L Ed 1107, 50 S Ct 451; Georgis Power Co. v Decatur, 281 US 505, 74 L Ed 999, 50 S Ct 369; Philip Wagner, Inc. v. Leser, 239 US 207, 60 L Ed 230, 36 S Ct 66; Home Tel & Tel Co. v Los Angeles, 227 US 278, 57 L Ed 510, 33 S Ct 312; Ulman v Mayor,

etc. of Baltimore, 72 Md 587 20 A 141, affd 165 US 717, 41 L Ed. 1184, 17 S Ct 1001; Branson v Gee, 25 Or 462, 36 P 527; Pinney v Providence Loan & Invest. Co., 106 Wis 396, 82 NW 308.

Rights under the Fourteenth Amendment turn on the power of the state, no matter by what organ it acts. Hughes v Superior Court of California, 339 US 460, 94 L Ed 985, 70 S Ct 718, 42 Ohio Ops 80, 57 Ohio L Abs 298.

The due process clause of the Federal Constitution applies to the state and all of its agencies. Cincinnati v Vester (CA6 Ohio) 33 F2d 242, 68 ALR 831, affd 281 US 439, 74 L Ed 950, 50 S Ct 360; Barrosw v Jackson, 346 US 249, 97 L Ed 1586, 73 S Ct 1031, reh den 346 US 841, 98 L Ed 361, 74 S Ct 19; Hansberry v Lee 311 US 32, 85 L Ed 22, 61 S Ct 115, 132 ALR 741; Brinkerhoff-Faris Trust & Savings Co. v Hill, 281 US 673, 74 L. Ed 1007, 50 S Ct 451; Hovey v Elliott, 167 US 409, 42 L Ed 215, 17 S Ct 841; Chicago B & QR Co v Chicago, 166 US 226, 41 L Ed 979, 17 S Ct 581; People v Belcastro, 350 Ill 144, 190 NE 301, 92 ALR 1223; Ulman v Mayor etc. of Baltimore, 72 Mc 587, 20 A 141, affd 165 US 719 41 L Ed 1184, 17 S Ct 1001; Re Cosgrave's Will, 225 Minn 443, 31 NW 2d 20, 1 ALR2d 175; Citron v. Mangel Stores Corp. (Sup) 50 NYS2d 416, affd 268 App Div 905, 51 NYS2d 754; State ex rel Atty. Gen. v Guilbert, 56 Ohio St. 575, 47 NE, 551; Commissioners of Sinking Fund of

Philadelphia, 324 Pa 120, 188 A 314, 113 ALR 202; Ladner v Siegel 298 Pa 487, 148 A 699, 68 ALR 1172. Neal v Delaware, 103 US 1370, 26 L Ed 567.

The Louisiana Supreme Court stated that:

> "Since established private property law concepts, such as trespass, have been superceded in part by Louisiana's Conservation law, when a unit has been created by order of the Commissioner..."

an actionable trespass did not occur; that the trespass was an authorized unit operation, said authorization apparently resulting entirely from unitization. The Court apparently credits the Commission with having taken Nunez's vested property rights without statutory authority. The Commissioner stated he did not do so.

Either the Commissioner or the Supreme Court took the vested property right from Nunez--whichever did is immaterial as both are forebidden from doing so by the 5th and 14th Amendments.

CONCLUSION

This jurisdictional statement and brief has shown that the rights and protection guaranteed to Adam G. Nunez by the 5th and 14th Amendments to the U. S. Constitution, Article 1 Section 4 of the Louisiana Constitution and the statutory and jurisprudential law applicable to the facts and the matter at hand will be violated if the decision of the Supreme Court of Louisiana is allowed to stand. Certainly that alone is sufficient to mandate a reversal of the Supreme Court of Louisiana. However, in conclusion, we need to consider one more thing and that is the potential harm of the ruling of the Louisiana Supreme Court.

LSA R.S. 30:204(b) prohibits all governmental agencies from interfering with the drilling of a well drilled in accordance with a permit granted by the Commissioner. There is no authority specifically and expressly granted to the Commissioner to permit drilling on private property (nor on public property).

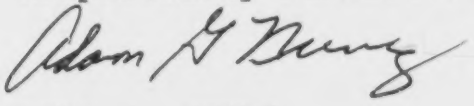
All law is opposite. But for the sake of argument, let's imagine that Wainoco applied for and the Commissioner validly granted a permit to drill in the middle of a foreign embassy, or through an underground chamber where atomic bombs, or deadly nerve gas or hazardous waste or the graves of many loved ones are located. Or let's imagine a permit being granted to drill where the Supreme Court building or other much greater, much more valuable and protected structure is located. We can't justify the destruction of a multi-multi million dollar building or the destruction and loss that would result from detonating a big bunch of atomic bombs or unleasing the government's supply of nerve gas on the public on the basis of the authority never granted to tne Commissioner, but nevertheless a permit granted by the Commissioner to drill a wildcat well that may never be productive. Or what if the permit is to drill into the strategic petroleum reserves--bonanza for Waimoco? But what of the reserves?

We can't rely on the law that requires the entity that damages to restore, as that entity could be bankrupt. This is especially true when we realize that the landowner's property is forever invaded or lost.

Those things which the Commissioner is specifically and expressly authorized by statute to do (to create drilling units, to force pooling, to require proportionate sharing of products, to prevent waste) are all to protect the landowner and mineral owner of the fugacious hydrocarbon that but for the conservation statute would be taken from one person's land by another landowner as a result of the moving characteristic of the hydrocarbons or would result in waste through unnecessary drilling and overproduction. When our courts upheld those powers specifically and expressly granted to the commissioner, the Court was quick to point out that in doing so, it was protecting the landowner.

There is no protection offered to anyone when property rights of Nunez are taken as was done in this instance--rather there is an unconstitutional thing that must be reversed.

Respectfully Submitted:



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APPENDIX A

SUPREME COURT OF LOUISIANA

No. 85-C-2307

ADAM G. NUNEZ

Versus

WAINOCO OIL & GAS COMPANY, TIDEWATER REALTY, INC., TIDEWATER BARGES, INC., WILSHIRE OIL & GAS COMPANY OF TEXAS, SOUTHERN CROSS LIMITED OF COLORADO,C.D.C. PRODUCING COMPANY, WILLIAMS EXPLORATION COMPANY, SOUTHPORT EXPLORATION, INC., THE JOHN W. MECOM COMPANY, T. KEITH MARKS, DONALD F. TODD, CYNTHIA TODD HENDON, RONALD E. MARTIN, GUY V. LAND, REMUDA CORPORATION, LAWRENCE BARKER, JR., H. T. FREEMAN, Trustee, JOE RAMOS, Trustee, WILLIAM W. WILSON, Trustee, A. K. MITTELSTAEDT, Trustee, ROBERT E. MILLER, IRVING POLLACK, JOHN C. KINARD, DAN W. WILLIAMS, ANDREW R. FISH, HARRY DERNICK, DERNICK RESOURCES, INC., MARINEX PETROLEUM COMPANY, ROGER AND COMPANY, WYNN & ASSOCIATES,EXCHANGE OIL & GAS CORPORATION, LEON COUNTY DEVELOPMENT COMPANY, INC. and CAMERON DEVELOPMENT COMPANY, INC.

On Writ of Review to the Court
of Appeal,
First Circuit,
Parish of East Baton Rouge

.CALOGERO, Justice

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We granted writs to determine whether the intrusion of a well bore (several inches in diameter) into the earth, at a point two miles beneath the surface, constitutes a trespass on the surface owner's property where that property is included in a drilling unit created by the Commissioner of Conservation. Further, if a protected interest is involved, we are asked to consider whether La. Rev. Stat. Ann.LSA R.S.30:1 et seq (which established and regulates the Department of Conservation and specifically authorizes the Commissioner to establish drilling units) supercedes the surface owner's right to absolute control of the subsurface as apparently envision by La. Civ. Code Ann. art. 490.

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On July 8, 1980, R. T. Sutton, the Commissioner of Conservation at that time, signed Order Nos. 1095 and 1016-B-2 to establish rules and regulations in the creation of three drilling and production units for the Lower Abbeville A Sand, Reservoir A, in the West Cameron Block 10 Field and Ocean View Beach Field, Cameron, Louisiana.[1] These orders followed a public hearing during which the geology of the area was discussed with regard to varying proposals for the creation of units as well as the optimum location for drilling wells within the units.[2] At the hearing, it was established that the highest structural position within Sand Unit F, and therefore the optimum position for location of the well which would be drilled within

Sand Unit F, was in the western portion of the 350 acre unit and included the area of a small unleased tracd owned by plaintiff, Adam Nunez. Although Wainoco Oil Company, which had begun exploring the Lower Abbeville A sand in 1977, had leased several tracts within Sand Unit F, the company had not acquired a lease on the Nunez tract. In declining to lease his land, Adam Nunez had opted to bear personally the financial risk of paying his share of drilling in return for the right to recover 100% of the production attributable to his tract's participation in the unit, rather than just a fractional royalty interest.

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[1]The three units were:

a) Lower Abbeville A RA SUG with designated Unit well, 6930 No. 4

b) Lower Abbeville A RA SUH with designated unit well, 6930 No. 1

c) Lower Abbeville A RA SUF which had no designated unit well.

Sand Units G and H were offshore units, and Sand Unit F was composed of adjoining onshore acreage.

[2]The Commissioner's authority to hold hearings is based on La. Rev. Stat. Ann. LSA R.S.30:4B The hearings are informal, and the Commissioner usually admits all evidence which appears to be relevant without regard to rules of evidence. L. Moses, Louisiana's Oil and Gas Conservation Law, 24 Tul. L. Rev. 311, 315 (1950).

On August 25, 1980, Wainoco filed an application with the Office of Conservation to drill the R.R.Stone No.1 well within the surface boundaries of the recently created unit. The permit was granted on September 23, 1980. Although Wainoco proposed to drill on the Stone tract on which they possessed a lease, the company contacted all owners in Sand Unit F prior to commencing operations to offer insurance coverage for the drilling and to submit an authority for expenditure setting forth the anticipated cost of drilling. All owners, including plaintiff Adam Nunez, agreed to advance proportionate shares of the costs for the Stone well.

Neither the application nor the permit, however, specified that drilling was

limited to the unitized sands. In fact, both stated that any zone or reservoir to a depth of 14,000 feet was a possible target. And the greatest depth at which Lower Abbeville A Sand, Reservoir A had been defined by the Department of Conservation was at 12,130 feet.[3] The well permitted on September 23 then was one that could be drilled deeper than the Lower Abbeville A sand had been defined thus far. The permit did specify, however, that the well was subject to Department of Conservation Order Nos. 29-B, 29-E, and 1016-B-2. Order Nos. 29-B and E are statewide rather than unit orders, which outline pertinent drilling regulations and specific well spacing.[4] Order No.

1016-B-2, mentioned at the outset of

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[3]Lower Abbeville A Reservoir A had been originally defined in 1977 Order No. 1016 as the "gas and condensate bearing sand encountered between the depths of 10,970 and 11,022 electrical log measurements" and later, in Order No. 1016-B-1, as "that gas and condensate bearing sand encountered between the depths of 12,030 feet and 12,130 feet electrical log measurements." The difference apparently reflects that a given sand is encountered at different stratographic depths depending on the location within the field.

[4]Order No. 29-E requires that wells be spaced 330 feet from a property or unit boundary line and that there must be 900 feet between oil wells and 2,000 feet between gas wells.

the opinion, created Sand Unit F in the Lower Abbeville A Sand, and its rules and regulations would be applicable to the well drilled by Wainoco if it produced from the Lower Abbeville A Sand. Generally, a state-wide order is directed toward the prevention of physical waste through the conduct of proper drilling practices, while the field or unit order is more concerned with the prevention of underground waste and maximum recovery of hydrocarbons. H. Daggett, Mineral Rights in Louisiana 487 (1949).

The location of the Stone well, according to the original permit, was in accordance with the optimum position

for the Sand Unit F. well as determined by the pre-unitization public hearing.[5] The actual location of the well, also considered an optimum location, was one foot farther north and 22 feet to the west of the permitted site, which placed it approximately 20 feet from a boundary of the Nunez tract. (It should be noted that the proximity of either site to Nunez property would have violated Order No. 29-E and prevented production should a unit not have been created.) Allegedly, the movement of the well was prompted by the proximity of the Boudreaux residence.[6] The drilling permit was not amended, however, until February 11, 1982 to reflect the well's actual

location.[7]

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[5]The placement of the well could have been located some distance from the existing placement and remained in an optimum location for Sand Unit F. In fact, under the established interpretation of LSA R.S.30:9C by the Commissioner, adherence to Order No. 29-E with its well spacing requirement results in well placement at the optimum allowable geological location.

[6]Apparently the original well site was too close to the Boudreaux residence. While no regulation required the change, it was likely done to accomodate the Boudreauxs. As an aside, for a well drilled below 15,000 feet (not applicable here) legislation dictates that it cannot be located closer than 500 feet to any dwelling.

[7]Joseph W. Hecker, Chief Engineer of the Louisiana Commission of Conservation, stated in deposition that it was not uncommon to amend the location for any number of reasons. He mentioned that property might be missurveyed, or that survey markers could be removed, or that the plat location could simply make it difficult to erect a derrick - all

of which could result in locating
w well other than at the precise
permitted site.

Drilling at the altered site had reached 10,000 feet by November 4 or 5, 1980. A directional survey, performed only in response to plaintiff's lawsuit, indicated that the well bore had entered Nunez property at that point and time; that it crossed back into Stone property before re-entering the Nunez tract on November 8 or 9 at 11,000 feet; and that it was ultimately bottomed 4 or 5 feet onto Nunez property although the intrusion may have persisted vertically for almost 750 feet, between depths of 11,000 feet and 11,730 feet. According to the directional survey, then, the deviation from the well's surface location to the bottom hole was

significantly less than five degrees. A well bore that has less than a five degree deviation from the vertical is by definition a straight hole under the provisions of Order No. 29-B, a statewide order made specifically applicable to defendant's September 23, 1980 drilling permit.

Before the well could be completed and production begun, it was necessary that it be designated the unit well for Sand Unit F, which as noted earlier had been created on July 8, 1980 by Order Nos. 1095 and 1016-B-2. Consequently, after determining that the well could be produced from the unitized sand, Wainoco applied to the Department of Conservation to amend the well name

from R. R. Stone to L ABB A RA SUF, Stone No. 1. An amended permit was issued on December 8, and on December 23, 1980, the well was completed. It thereupon began producing as the unit well for Sand Unit F.[8]

PROCEDURE:

On August 21, 1981, Adam Nunez filed suit in the 38th Judicial District Court, Parish of Cameron against Wainoco Oil Company and other owners within Sand Unit F. He alleged that the Stone No. 1 well was bottomed in his property, and that same constituted a trespass. He sought an injunction ordering Wainoco to remove the well bore. The suit was dismissed on the ground that it was a

collateral attack upon an order of the Commissioner of Conservation. The lawsuit was thereupon filed in the 19th Judicial District Court, East Baton Rouge Parish, and the Commissioner of Conservation and other owners of working interests in Sand Unit F were added as defendants.

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[8]It is also worthy of note that the unit boundaries and the unit well, at its amended location, were confirmed by the Commissioner of Conservation after a public hearing on June 8, 1982 by Order Nos. 1095-B and 1016-B-3, despite the protest of the plaintiff who presented allegations regarding the intrusion of the well bore into the subsurface beneath his tract.

Plaintiff moved for summary judgment on the issue of his right to an injunction, and the defendants filed a cross-motion for summary judgment asking that plaintiff's suit be dismissed if the court upheld the Commissioner's authority and duty to designate the unit well. The trial judge denied plaintiff's motion; he granted the motion for summary judgment on behalf of the Commissioner of Conservation and dismissed the Commissioner as a defendant; and he granted partial summary judgment in favor of the other defendants, affirming the Commissioner's refusal to order removal of the well and the right of the other defendants to continue to operate the well.

On appeal, the First Circuit affirmed the motion for summary judgment granted in favor of the Commissioner of Conservation, which dismissed him from the suit. The court concluded that "the commissioner was within his authority to issue the unitization order and to designate a unit well thereon." However, with regard to the other defendants, the First Circuit ruled that the Commissioner's order did not and could not authorize drilling on or under unleased property without the consent of the landowner. Thus, the Court of Appeal panel held that "(i)f in drill-this well, the unit operator enters onto or drills under property in or out of the unit without permission

from the owner of the land, the operator has committed a trespass." Accordingly, the case was remanded to the trial court for a determination of whether a trespass took place and, if so, whether the trespass was in good or bad faith. Citing case law, the court reasoned that any bad faith trespasser would be compelled to remove the encroachment and to pay damages.

SUBSURFACE TRESPASS

> A subsurface trespass is defined as
>
> The bottoming of a well on the land of another without his consent...(which) results from the drilling of a "slant" or directional well, which may be intentional or inadvertent. Since subsurface trespass is a wrongful as surface trespass,

> the same liability attaches, viz., the damages in the amount of the value of the oil produced. H. Williams and C. Meyers, Oil and Gas Terms 737 (5th ed. 1981).

That definition is in accord with our decision in Gliptis v. Fifteen Oil Co., 204 La. 896, 16 So.2d 471, 474 (1943), which concluded that the invasion by any person into the subsurface of his neighbor's land and the extraction therefrom of minerals such as oil and gas would be a trespass. Although the Gliptis court did not consider damages, since the primary issue there concerned whether to permit appointment of an expert to make a directional survey of the defendant's well, the California cases relied on recognized that "damages are measured by the amount of oil

and gas taken from the well." Id. at 480 (quoting Summers, Oil & Gas vol.I, 26 (Perm. Ed. 1938)

Thus, subsurface trespass, which by definition involves bottoming of a well on the land of another without his consent, and/or invading or intruding upon the subsurface of another's land, has in the jurisprudence generally been accompanied by removal of minerals, with the attendant damages consisting of the value of the extracted minerals. In the criminal law context, this removal element would seem to add the crime of theft (La.Rev.Stat.Ann. LSA R.S. 14:67) to criminal trespass (La. Rev.Stat.Ann. LSA R.S. 14:63). The latter statute requires only entering the property of another without

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authorization. In this case at any rate, both an alleged, unauthorized physical intrusion[9] and the removal of minerals occurred. However, as a participant in a unit created by the Commissioner of Conservation, the property owner claiming trespass was entitled to and did receive a proportionate share of the value of the hydrocarbons produced from the reservoir underlying his land and that of his neighbors.[10]

We find it significant that the situation in Gliptis, from which our definition of subsurface trespass emanates, did not involve a Commissioner's drilling unit. In that case, plaintiff owned a producing oil well, which he alleged was destroyed when the defendant drilled

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his own well only 33 feet from the property line and bottomed it beneath plaintiff's property, adjacent to his well. The court relied on the established rule that the owner of the land has the exclusive right to explore his land for the production of minerals, which necessarily foreclosed the right of a neighbor to invade his subsurface and to extract the fugacious minerals. As will be developed later in this opinion, it was in response to such a situation that the Commissioner of Conservation was empowered by La.Rev. Stat.Ann. LSA R.S.30:9B to establish drilling units, defined as "the maximum area which may be efficiently and economically drained by one well," in order to prevent

waste, to avoid the drilling of unnecessary wells, and coincidentally, to regulate conduct of neighboring owners.

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[9]Plaintiff's claim is founded on his ownership of that part of the earth which is two miles beneath the surface of the tract of land to which he holds title. Indeed, La. Civ. Code Ann. art. 490 provides in pertinent part:

> Unless otherwise provided by law, the ownership of a tract of land carries with it the ownership of everything that is directly above or under it.

Noting that the earth is round, we point out that a surface tract's subsurface measurement must necessarily narrow as it approaches the center point of the earth. Ownership of subsurface tracts equal in size to surface tracts would result in overlapping boundaries as the available area diminishes. Just how much or how little plaintiff's subsurface ownership has narrowed at a depth of two miles is a peripheral question which, needless to say, will not be addressed in this opinion.

[10]Assuming a trespass, plaintiff is unable to claim the traditional "damages," his value of the hydrocarbons produced, for he has already received his proportionate share of production from the unit. He does, however, seek further relief in his claim for an injunction, ordering the offending operator to remove the well bore. Defendants suggest that the removal of the well would result in significant waste in that a producing well would be destroyed and the ultimate recovery of reserves underlying the unit would be decreased. They note that due to the stage of reservoir depletion, a substitute well probably would not be economically feasible, which would further prejudice the correlative rights of all parties in the unit.

Therefore, we must consider whether the formation of a compulsory unit, as permitted in La. Rev. Stat. Ann. LSA R.S. 30:10, affects the generally applicable principles concerning ownership of property and/or alters the concept of trespass beneath the surface owner's tract. In that regard, we review Title 30, Minerals, Oil, and Gas, its history and its application.

LA. REV. STAT. ANN. LSA R.S. 30:1 et seq:

LOUISIANA'S OIL AND GAS CONSERVATION LAW

Oil is found in reservoirs which generally are bodies of porous and permeable rock in which oil has accumulated in sufficient quantity

to permit its commercial recovery. In order for this underground accumulation to permit profitable production, there must be a high enough concentration of oil to permit movement and there must be a source of energy available to move the oil from the reservoir into the well. Although this reservoir energy may be of several types, the chief explusive force is gas. Production occurs once the reservoir is punctured by drilling operations and the pressure gradients combine to move the oil toward the point of lower pressure and to lift it through the opening to the surface. Since gas and water tend to move toward the area of reduced pressure more

rapidly than does oil, these sources of reservoir energy may by-pass the oil, making their way to the well alone and leaving behind a part of the oil, if production is not controlled. It is necessary to employ a reasoned and proportionate use of the reservoir energy if production is to bring to the surface the greatest percentage of recoverable oil. H. Daggett, Supra at 414-17.

In the early days of the oil industry, these physical factors were poorly understood. It was thought that oil flowed in underground rivers and an analogy was seen between the ownership of oil and the ownership of water and animals which traverse one's property. Thus, the "rule of capture"

vas adopted (and has been sustained within certain limitations even after the nature of reservoirs was better understood.) It has been defined as

> a rule of law (sometimes called rule of convenience) arising from ownership of property, or the right to produce oil and gas, by virtue of which an operator who drills on his own land, or land held under an oil and gas lease or other instrument, acquires title to the oil which he legally produces from the well, whether or not drainage takes place from surrounding properties. H. Daggett, supra at 419-21.

Needless to say, the period of oil and gas development that followed the adoption of such a rule was characterized by haste, inefficient operations, and immeasurable waste within the ground and above. In

Lilly v. Conservation Commissioner of Louisiana, 29 F. Supp. 892, 897 (E.D. La. 1939), it was suggested that

> Without the power to regulate or control conditions in an oil field, the temptation to acquire qhick riches might easily produce an intolerable situation in drilling indiscriminately upon any size or shape of tract, sufficient to permit derrick operations, resulting in waste and exhaustion of underground energy consisting of natural gas, etc. and ultimately restricting recovery, involving useless expenditures by operators and preventing some, if not all, from recovering their investments.

Thus, this federal district court judge reasoned that

> (s)uch a condition, it would seem, should be subject to the police power of the State, not only to prevent waste,

but to insure a fair and reasonable participation, by the surface owners in the common pool within the producing area.

In fact, Louisiana early recognized the need for legislative control of the industry and displayed a concern that an irreplaceable natural resource should not be subjected to avoidable waste. Thus, in 1905, gas was discovered in the Caddo Field in North Louisiana, and, in 1906, the Legislature responded to a disastrous blowout by making it a criminal offense to negligently permit a gas well to burn wastefully.[11] Then, in 1924, the first all-inclusive statutes, one for gas and one for oil, were enacted, and the principle of ownership in a common source of supply

co-extensive with the individual ownership in the land was recognized.[12] A comprehensive statute modeled after New Mexico's law, regulated the spacing of wells and authorized compulsory pooling, in 1936.[13] It failed, however, to adequately define "waste," and its general procedural articles were inadequate. Rather than amend the conservation measures piecemeal, the Legislature determined that a complete revision of existing legislation was needed. The result was 1940 La. Acts No. 157, which embodied the best features of the New Mexico law as well as the then recently enacted Arkansas law.

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[11] 1906 La. Acts No. 71.

[12]1924 La. Acts Nos. 252 and 253.

[13]1936 La. Acts No. 225

Based on almost 50 years of legislative experience and judicial interpretations, this conservation statute was considered one of the best in the country. L.Moses, Louisiana's Oil and Gas Conservation Law, 24 Tul. L. Rev. 311 (1950). This act, as amended constitutes Louisiana's basic conservation law with respect to the oil and gas industry.

At the time of the act, the Department of Conservation, directed and controlled by the Commissioner of Conservation, had already been established by La. Const. of 1921, art. VI, LSA R.S. 1(C).[14] When the 1974 Constitution deleted Article VI, LSA R.S. 1(C) of the 1921 Constitution,[15]

La. Rev. Stat. Ann. LSA R.S. 30:1A was amended to establish the Department under the direction of a Commissioner who was to be appointed by the governor for a four year term, with the consent of the Senate.

The Commissioner has the general power and "authority over all persons and property necessary to enforce effectively the provisions of this Chapter and all other laws relating to the conservation of oil and gas."[16] He has specific investigative powers

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[14]This article created a Department of Conservation to regulate the State's natural resources other than animals, game and aquatic life. However, legislation regarding the administration of conservation matters began as early as 1908 when

a Board of Commissioners, authorized to investigate and report on the condition of the natural resources of the state, was created by 1908 La. Acts No. 144. H. Daggett, supra at 478.

[15]Article IX of the 1974 Constitution now deals generally with natural resources. Section 1 of Article IX contains the basic assertion of the public policy of protecting and conserving the natural resources of the state and grants authority to the Legislature to enact laws to implement this policy.

[16]La. Rev. Stat. Ann. LSA R.S. 30:4A.

o determine whether or not "waste"[17] xists or is imminent[18] and the eneral authority to establish whatever ules, regulations, and orders are ecessary to prevent it and to en- orce the conservation laws.[19] In ecognition of the physical factors nvolved in the production of hydro- arbons, the Commissioner is also iven the specific power to establish drilling unit or units for each pool.[20] Although the owners of separate racts may "agree to pool their nterest and to develop their lands s a drilling unit,"[21] the Commissioner s authorized to "require" unwilling wners to pool their interests if he inds it necessary to prevent waste

or to avoid drilling unnecessary wells.[22] This power of forced integration has been described as "(a) necessary weapon in the enforcement of drilling patterns."[23]

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[17]"Waste" and its prevention, which is at the foundation of the state's conservation policy, is appropriately the first definition in 30:3. Waste includes

> (a) the inefficient, excessive, or improper use or dissipation of reservoir energy; and the location, spacing, drilling, equiping, operating, or producing of an oil or gas well in a manner which results, or tends to result, in reducing the quantity of oil and gas ultimately recoverable from a pool....

[18]LSA R.S.30:4B.

[19]LSA R.S.30:4C.

[20]LSA R.S.30:9B.

[21]LSA R.S.30:10A.

[22]La. Rev. Stat. Ann. LSA R.S.30:10A(1) provides:

> (1) Where the owners have not agreed to pool their interests, the commissioner shall require them to do so and to develop their lands as a drilling unit, if he finds it to be necessary to prevent waste or to avoid drilling unnecessary wells.

The various unitization statutes uniformly permit interested parties to institute unitization proceedings, and several statutes allow the regulatory commission to act upon its own motion as well. H. Williams and C. Meyers, Oil and Gas Law Vol 6 LSG R.S.913.3 (1985).

[23]L. Moses, supra at 316.

The effects of forced pooling have been described in Mire v. Hawkins, 249 La. 278, 186 So.2d 591, 596 (1966). Forced pooling or compulsory unitization was found to convert separate interests within the drilling unit into a common interest with regard to the development of the unit and the drilling of the well. The Mire court, asked to consider whether the designation of nondrilling areas within drilling units created by the Department constituted an obstacle to the use of a mineral servitude on lands within the non-drilling areas, recognized that the effects of unit operations were "a departure from the traditional notions of servitude contemplated by the Civil

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Code" although they were validly imposed by law for a public purpose.

In fact, the concept of unitization, embodying the principle of ownership in minerals produced from a common source of supply, co-extensive with the individual ownership of the overlying land, is a departure from the traditional notions of private property. Ownership, defined in La. Civ. Code Ann. art. 477 as "the right that confers on a person direct, immediate, and exclusive authority over a thing," suggests dominion and does not contemplate that others have rights to the object of ownership. According to La. Civ. Code Ann. art. 490, such exclusive authority, applies to the subsurface directly beneath a erty

owner's tract.

We note, however, that each of these provisions has been modified in recent years to reflect a qualification of sorts in one's rights in private property. Whereas the predecessor to La. Civ. Code Ann. art. 477[24] granted to the owner use of property "in the most unlimited manner, provided it is not used in any way prohibited by law or ordinances."

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[24] La. Civ. Code Ann. art. 491, amended 1979 La. Acts No. 180.

currently an owner may use, enjoy, and dispose of a thing only "within the limits and under the conditions established by law." which contemplates a broader range of exceptions to an owner's exclusive authority. And, La. Civ. Code Ann. art. 490's assertion that "the ownership of a tract of land carries with it the ownership of everything that is directly above or under it " was modified in 1979 to add the phrase "(u)nless otherwise provided by law." Such a change no doubt aid occur, at least in part, in recognition of the traits of subsurface minerals in liquid and gaseous form.

Those traits prompted inclusive in the Mineral Code (Title 31) of

LSG R.S. 6 which provides:

> Ownership of land does not include ownership of oil, gas, and other minerals occurring naturally in liquid or gaseous form, or of any elements or compounds in solution, emulsion, or association with such minerals. The landowner has the exclusive right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership. (emphasis added) 1974 La. Acts No. 50, LSG R.S. 6.[25]

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[25] Although the 1974 Mineral Code apparently first provided statutory authority for the proposition that oil and gas under the ground is not susceptible to ownership, early jurisprudence recognized this very concept. See Frost-Johnson Lumber Co. v. Salings Heirs, 150 La. 756, 91 So. 207 (1922).

Thus, it is clear that whatever the plaintiff may own under his tract, it does not include the liquid or gaseous minerals themselves. And, even the "exclusive right to explore" is qualified by the imposition of duties with regard to others who have rights in the common reservoir. La. Rev. Stat. Ann. LSA R.S.31:9 and 10. As noted by a scholar on the subject, "(t)he principles of private ownership which involve dominion on the part of the landowner over all substances from the center of the earth to the heavens were inadequate to solve the problems of a substance under the earth, which would migrate to points of lower pressure caused by punctures of the reservoir by drilling." H. Daggett, supra at 415.

And what this plaintiff does own under his tract is "subject to reasonable statutory restrictions and the reasonable exercise of the police power." According to La. Const. art. I LSA R.S. 4:

> Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.

Furthermore, this Court has already ruled that the Commissioner of Conservation's power to establish drilling units is a constitutional exercise of the State's police powers. Hunter Co., Inc. v. McHugh, 202 La. 97, 11 So.2d 495, 502-03 (1942) (quoting Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900)). In Ohio Oil Co. v.

Indiana, the United States Supreme Court viewed a similar statute as one actually "protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others."

Unitization is the device wnich the Louisiana Department of Conservation employs to protect the correlative rights of surface owners in a common reservoir, and, as discussed earlier, the device is clearly available without theconsent of a particular landowner. La. Rev. Stat. Ann. LSA R.S.30:10A(1). In addition to the ability to establish drilling units for each pool, the Commissioner is authorized is designate a drilling site "at the optimum position in the drilling unit for the

most efficient and economic drainage of such unit." La. Rev. Stat. Ann. LSA R.S.30:9C. The Commissioner must also issue a permit before the well can be drilled, and "the issuance of the permit...is sufficient authorization to the holder of the permit to enter upon the property covered by the permit and to drill in search of minerals thereon." LSA R.S.30:204A and F. Although LSA R.S.30:217 specifically requires the consent of the owner before any person conducts geological surveys for oil, gas, or other minerals, LSA R:S30:204F, authorizing the permit holder to enter the property for drilling purposes, has no such requirement for consent.

In fact, the high court of another

oil producing jurisdiction has held that the operator of a pooled unit has a right to drill on a tract without the consent of the owner of the land on which the well was to be located.[26] Texas Oil and Gas Corp. v. Rein, 534 P.2d 1277, 12798 (Okla. 1975). The Oklahoma Supreme Court noted that

> To hold otherwise would frustrate the intent of the Act because the owner desiring to drill would not be entitled to do so unless he held a lease covering the well location designated by the Commission.

Like the Oklahoma Supreme Court, we conclude that the established principles of private ownership, already found inadequate in Louisiana to deal with the problems of subsurface fugacious minerals (see Daggett, supra at 415), need not necessarily be

applied to other property concepts, like trespass, within a unit created by the Department of Conservation.

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[26]The Oklahoma statute, like its Louisiana counterpart, requires a hearing prior to the declaration of a unit. Should it be shown that the drilling of the well at the prescribed location would be inequitable or unreasonable, the well need not be drilled at the designated site. Further, any order is made with "just and reasonable" conditions designated to afford the owner of the tract designated as the optimum location with the opportunity to recover his fair share of production without unnecessary expense. Similarly, the Louisiana jurisprudence has held that an order by our Commissioner of Conservation must be "reasonable" and can be overruled by a contrary showing. Alston v. Southern Production Co., 207 La. 370, 21 So.2d 383 (1945).

Unitization, which creates rights and interests in a pool of hydrocarbons beyond the traditional property lines, effectively amends La. Civ. Code art. 490 and other private property laws in the interest of conserving the natural resources of the state and, in effect, of protecting private property interests, or "correlative rights." of nondrilling landowners. By prohibiting an individual landowner in the unit from drilling wells on their own tracts, by forcing them to share production, and by limiting the amount of hydrocarbons that can be produced, the exercise of the Commissioner's power to unitize necessarily results in infringement on the usual rights of ownership. Unitization has also

resulted in changes in the legal relationships between landowners and lessees within the unit. For instance, the inclusion of a leased tract within a unit relieved the lessee of the tract of his obligation to drill a well on the leased premises. The Court in Delatte v. Woods, 232 La.341, 94 So.2d 281, 287 (1957), relied on the established rule that "the drilling and production of oil from a unitized area constitutes an exercise and use of the mineral rights throughout the entire unit and operates as a substitute for performance of drilling obligations contained in a mineral lease covering any property or tract located within the unit."

Therefore, we hold that the more recent legislative enactments of Title

30 and Title 31 supercede in part La. Civ. Code Ann. art. 490's general concept of ownership of the sub-surface by the surface owner of land. Thus, when the Commissioner of Conservation has declared that landowners share a common interest in a reservoir of natural resources beneath their adjacent tracts, such common interest does not permit one participant to rely on a concept of individual ownership to thwart the common right to the resource as well as the important state interest in developmenting its resources fully and efficiently.

In this case, we do not have a well located on the surface of a tract without the owner's consent. Instead, we have the intrusion of a well bore

two miles beneath the surface of plaintiff's land, land which had already been included in a drilling unit. The well itself was drilled on a leased tract, in part at the urging of the plaintiff[27] and with his financial participation. It was a well permitted and subject to Statewide Order No. 29-B, which allows a drilling

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[27]At public hearings prior to the issuance of Order Nos. 1095 and 1016-B-2, plaintiff and his geologist, James Namias, expressed concern that his property was being drained by producing wells in the field, and applied for inclusion of this property in producing units. Apparently in response to exhibits and testimony presented on behalf of plaintiff in 1979, the Commissioner decided in 1980 to create an additional unit, Sand Unit F, which would include all of the plaintiff's unleased acreage not already included in a producing unit.

deviation from the vertical of up to five degrees. Although the well was not formally designated as the unit well until 33 days after the well bore likely traversed the invisible boundary into plaintiff's property, the well was clearly intended to be the unit well [28] and could not be produced until it was declared the well for Sand Unit F, or, if the well bottomed in other than Reservoir A, until another unit was created. Therefore, we conclude that the intrusion into the subsurface two miles beneath the tract owned by Adam Nunez was an authorized unit operation. Since established private property law concepts, such as trespass, have been superceded in part by Louisiana's

Conservation Law when a unit has been created by order of the Commissioner,

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[28]The jurisprudence indicates that it is the intent of the operator and the operations conducted which determine whether drilling operations constitute unit operations or merely lease operations. In Bass Enterprises Production Co. v. Kiene, 437 So.2d 940 (La. App. 2d Cir. 1983), the well was permitted for non-unitized sand but was drilled within the boundaries of a unitized sand. When the permitted sand was found not to be commercially productive of hydrocarbons, the well was plugged back and tested at other intervals, including the unitized sand. Although production was not obtained from the unitized sand and thus the well was never permitted as the unit well, these operations were sufficient to interrupt prescription on a servitude tract within the unit. Similarly, in Gorenflo v. Texaco, Inc., 566 F. Supp. 722 (M.D. La. 1983), operations for the drilling of a well, conducted before the well was permitted as the unit well, were found sufficient unit operations to maintain the lease. The Court noted that there was no indication that "drilling under a permit which gives the well a name which does not show its status (as a unit well) is

illegal." Id. at 729. Indeed, the amended permit, which designated the Stone Well No. 1 as the unit well for Sand Unit F, indicated that the amendment action was a change in the well "name" from lease to unit. Such a procedure does not seem to be of sufficiently significant stature to affect the relationships between the parties.

we do not find that a legally actionable trespass has occurred in this instance.[29]

Decree

For the foregoing reasons the judgments of the district court and the Court of Appeal, relative to defendant/relators' motion for summary judgment, are set aside; summary judgment is herewith rendered in favor of defendant/relators and against plaintiff, dismissing plaintiff's suit with prejudice and at his costs.

JUDGMENTS SET ASIDE; SUMMARY JUDGMENT IN FAVOR OF DEFENDANT/RELATORS GRANTED.

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[29]However, we acknowledge that should a unit operation create for one landowner within the unit a particular

expense, as a result of damage to his premises, or measurable inconvenience, that landowner may be entitled to recover compensation in addition to a proportionate share of production, a matter which we need not resolve in this case. See Cormack v. Wil-MC Corp., 661 P.2d 525 (Okla. 1983). In Cormack, the Oklahoma Supreme Court concluded that although an owner of an unleased mineral interest in a tract incorporated by a forced pooling order may be required by the state to accept an intrusion on his land for the drilling of a well and to accept the accompanying damages to his property, he is entitled to a cause of action for compensation for those damages. (The damages in Cormack , however, were surface damages.)

APPENDIX A-1

SUPREME COURT OF LOUISIANA
New Orleans 70112

FOR IMMEDIATE NEWS RELEASE NEWS RELEASE #69

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 19th day of June, 1986, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

REHEARINGS DENIED:

85-C-0981 Lawrie G. Williams v Keystone General Contractors, Inc., et al

85-C-2265 Tommy A. Thomas v. Hanover Insurance Co., et al
DIXON, C. J., & LEMMON, J., would grant a rehearing.

85-C-2307 Adam G. Nunez v. Wainoco Oil & Gas Co., et al
WATSON, J., would grant a rehearing.

85-C-2347 Eva Agnes Nix, et al v. City of Houma, et al
MARCUS, J., would grant a rehearing.

86-C-0013 and 86-C-0032 American Waste & Pollution Control v. Madison Parish Police Jury, et al

86-C-0091 Lynn D. Berry v. Holston Well Service, Inc. et al

(p. 1 of 1 page)

APPENDIX B

COURT OF APPEALS - FIRST CIRCUIT

ADAM G. NUNEZ

versus No. CA 84 0717

WAINOCO OIL & GAS COMPANY,
ET AL

On Appeal from the Nineteenth Judicial District Court, In and For the Parish of East Baton Rouge, State of Louisiana, Number 253,360, The Honorable Lewis S. Doherty, III, Judge.

BEFORE: CARTER, SAVOIE AND ALFORD, J.J.

ALFORD, J.

Rendered: October 8, 1985

This is an appeal from a partial summary judgment affirming the location and operation by the defendant, Wainoco Oil and Gas Company (Wainoco), of a unit well which is bottomed on unleased property belonging to the plaintiff, Adam G. Nunez, that is located

within the unit. The court denied plaintiff's motion for summary judgment to require removal of the well, released the Commissioner of Conservation as a defendant, allowed the remaining defendants to continue to operate the well in question, and limited plaintiff's action against the other defendants to one for damages in the event that plaintiff proves that the location of the well constitutes a subsurface trespass. More specifically, on the latter ruling, the trial court held that the plaintiff could not have the trespass removed, even if bad faith trespass is proven.

FACTS

The plaintiff's property was

included in a compulsory undrilled unit formed by the Commissioner of Conservation after a public hearing. The plaintiff attended the public hearing and supported the creation of the unit. The geological information presented at the hearing and adopted by the Commissioner indicated that the optimum position of the unit well would be in the western portion of the unit which included the plaintiff's tract.

Wainoco applied for and received a permit from the Commissioner to drill a well within the unit. The surface location of the well in question is located on leased land within the unit; however, the well, which is producing from the unitized

sand,is bottomed on the plaintiff's unleased property within the unit. Plaintiff participated in the drilling of the well as a working interest owner, advanced his share of the drilling costs and received revenues from production. The well, originally permitted as a lease well subject to Statewise Orders 29-B and 29-E and to Unit Order 1016-2, was designated as the unit well after it was determined to be capable of producing from the unitized sand. Some two and one-half years later, the well was confirmed as the unit well after a public hearing, at which the plaintiff appeared and opposed the confirmation alleging subsurface trespass.

Prior to confirmation of the well

as the unit well, the plaintiff filed the instant suit to require Wainoco to remove the well, alleging subsurface trespass by Wainoco and other defendants. Wainoco answered claiming that since the well was designated as the unit well, no trespass was involved. The Commissioner of Conservation answered supporting his designation of the well as the unit well in order to comply with his statutory duty to conserve the natural resources of the state and to efficiently and economically develop oil and gas resources in the public interest. Both sides moved for summary judgments, and the trial court rejected the plaintiff's motion and granted partial summary judgment in favor of

the defendants as noted above.[1]

DISCUSSION

The Commissioner of Conservation is under a duty to exercise the police power of the state in order to conserve the state's mineral resources in the public interest. LSA-R.S. 30:1 - 30:63. In so doing, the commissioner must prevent waste and avoid the drilling of unnecessary wells by establishing a drilling unit comprised of the maximum area within a pool or reservoir which can be efficiently and economically drained by one well. LSA-R.S. 30:9. This unitization of separately owned tracts protects the correlative rights of each owner within the unit by allowing each to recover no more than his just and

equitable share of production from the pool. LSA-R.S. 30:9.

In the instant case, while the plaintiff does not question the validity of the unit in which his property is located, he argues that the trial court erred in upholding the designation and confirmation of the well as the unit well. He contends that the designation of the location for the unit well does not comply with LSA-R.S. 30:9C. When the commissioner unitizes an undrilled area, he must designate a unit well in the order creating the unit at a location that affords the most efficient and economic drainage of the unit and that insures that the producers obtain no more than their

equitable share of the oil and gas in the pool. LSA-R.S. 30:9C. For more than 25 years, the commissioner has designated the location of the unit well in his order creating the unit by reference to Statewide Order 29-E rather than attempting to pinpoint the exact surface location. This statewide order regulates the minimum spacing between wells and between wells and property lines. The property lines referred to by the order are defined as the unit boundaries when a unit is involved.

Under the doctrine of contemporaneous construction, settled administrative practice may serve as a fair index of legislative intent. Washington v. St. Charles Parish School Board 288 So.2d 321 (La. 1974). Although an

interpretation of a law by another department of government does not control the judiciary, where officers charged with the enforcement of a law have determined its meaning and acted accordingly for a long period of time, their interpretation is entitled to great weight. State ex rel Payne v. Exchange Bank of Natchitoches, 147 La. 25, 84 So. 481 (La. 1920). "That is because of a presumption that the public officers' method of applying the law would not be tolerated until it had grown into a regular practice, if it were unauthorized." 84 So. at 483.

Therefore, the construction of a statute by administrative officers will not be overruled unless clearly

wrong or unless a different construction is plainly required. State v. Standard Oil Co. of Louisiana, 190 La. 338, 182 So. 531 (La. 1938). Moreover, the general principle governing judicial review of administrative decisions is that, if the evidence as reasonably interpreted supports the determination of the administrative agency, its orders will not be reversed or modified in the absence of a clear showing that the administrative action is arbitrary and capricious. LSA-R.S. 49:964, Subd. G(5,6). Summers v. Sutton, 428 So.2d 1121 (La. App. 1st Cir. 1983)

In the instant case, the commissioner designated the location of the unit well in the order creating

the unit (Order 1016-B-2) by reference to Statewide Order No. 29-E after a full public hearing and an examination of the geological evidence. This procedure has been the standard practice for more than 25 years. We can find no clear error in the commissioner's use of the statewide order to designate a general optimum location rather than pinpointing the exact surface location. Furthermore, the statewide order contains a procedure to be used by the commissioner for altering the location of the well if the 29-E spacing does not provide an optimum location in accordance with LSA-R.S. 30:9C. Wainoco's selected location complied with the minimum spacing requirements of 29-E in regard

to unit boundaries.

Plaintiff also complains about the amendment of the permit to show the well to be the unit well. The permit to drill issued by the commissioner required that the well be drilled in accordance with Statewide Order 29-B, as well as 29-E and the unit order for that particular sand. During the drilling of the well, Wainoco provided an inclination survey in order to show compliance with 29-B. This order allows a deviation of five (5) degrees from the vertical while drilling a straight hole into the ground. As long as the well is bottomed within five (5) degrees of the surface location, and the surface location is at least 330 feet from a property line, it is considered a

straight hole and need not meet directional drilling requirements. The survey showed a deviation from the vertical of approximately one degree (about 162 feet and 11,444 feet subsurface), well within the five (5) degrees allowable. The well bottomed within the unit in the unitized sand, and it was determined that the well bore did not cross any property line, i.e., unit boundary line, since the well met the 330 foot minimum spacing requirement as to unit boundaries. Thus, from the evidence as reasonably interpreted by the Commissioner, the well drilled by Wainoco met the required conditions and his action in designating the well as the unit well was not clearly

arbitrary or capricious.

The plaintiff alleges that the commissioner acted arbitrarily and capriciously in confirming the well as the unit well in June of 1982, some two and one-half years after its designation as the unit well. The well was producing from the unitized sand, and the geological information provided at the June 8, 1982, public hearing as to optimum location of the unit well was not disputed by the plaintiff. After evaluating the exhibits and testimony, the commissioner issued Order No. 1095-B and 1016-B-3 which confirmed the unit created previously and continued Wainoco's well as the unit well serving as the reasonable and appropriate means to conserve the natural

resources of the state, to prevent waste and to avoid the drilling of unnecessary wells. We are unable to find any clear showing that the commissioner's actions were arbitrary and capricious. This being the case, there is no reason the commissioner should remain in this suit.

This, however, does not end the inquiry. It is true, as we have said, that the commissioner was within his authority to issue the unitization order and to designate a unit well thereon, but the trial court granted a partial summary judgment to the defendants limiting plaintiff's remedy, in the event he proves a trespass, to damages, reasoning that the commissioner authorized the

position of the well under the administrative powers given him by the state. In the effect, the trial court said plaintiff is powerless to have any part of the well removed - even that portion which encroaches on his property. We find this reasoning flawed.

The commissioner must give due regard to individual and property rights; however, these rights must yield to a proper exercise of the police power. See Delatte v. Woods, 232 La. 341, 94 So. 2d 281 (La. 1957). The commissioner carries out the valid statutory mandate by issuing forced pooling unitization orders establishing drilling units after public hearings are held. LSA-R.S. 30:9; 30:10. The forced pooling converts various

separate interests into a common interest as far as development of a unit and the drilling of the unit well are concerned. Mire v. Hawkins, 249 La. 278, 186 So.2d 591 (La. 1966). Under forced pooling, owners of tracts within the drilling unit must pool their interests for the purposes of development, and a well drilled on any tract within the unit is considered as having been drilled upon each separate owner's tract. LSA-R.S. 30:10. Individual tract owners thus lose the right to search independently for oil and gas under their land. Such forced pooling has been deemed to be a constitutionally valid exercise of the state's police power. Alexander v.

Holt, 116 So.2d 532 (La. App. 2d Cir. 1959).

Nowhere in the legislature's grant of authority to the commissioner is there an express provision allowing him to authorize drilling on or under unleased property without the authorization or consent of the landowner.

It is basic to Louisiana law that an owner of land may use, enjoy and dispose of that land and its fruits, including everything directly above or under it, restrained only by explicit and specific laws and rights of others. La. Civ. Code arts. 477, 483, 490. The right to permit entry on land to explore for oil, gas or other minerals is a valuable property right belonging

exclusively to the landowner. Picous v. Fohs Oil Co., 222 La. 1068, 64 So. 2d 434 (La. 1953); Franklin v. Arkansas Fuel Oil Co., 218 La. 987, 51 So.2d 600 (La. 1951); Angelloz v. Humble Oil and Refining Co., 196 La. 604, 199 So.2d 656 (La. 1941). A landowner states a cause of action when he claims a subsurface trespass by a party whose well is bottomed on the plaintiff's property. Gilptis v. Fifteen Oil Co., 204 La. 894, 16 So.2d 471 (La. 1944). See also, LSA-R.S. 31:12, 14.

In the case before us, the commissioner included plaintiff's property in the drilling unit. This was within his powers. He authorized

a five degree deviation from the vertical in drilling downward. This, too, was within his powers. The commissioner's order did not authorize and could not authorize anyone to drill on or under unleased land where there was no permission from the owner of the unleased land. The order lacked that authorization because the commissioner lacked the power to give that authorization. His power to infringe on the property rights of landowners is restricted to those things specifically authorized by Louisiana law. Authorizing oil exploration on land without the landowner's permission is not a power specifically given in the statutes.

If a well is drilled within the commissioner's specifications, as this

one appears to have been, it remains an approved unit well. If in drilling this well, the unit operator enters onto or drills under property in or out of the unit without permission from the owner of the land, the operator has committed a trespass.[2] If in bad faith, the trespasser is bound to remove the encroachment and pay damages. Esnard v. Cangelosi, 200 La. 703, 8 So.2d 673 (La. 1942); Barker v. Houssiere-Latreille Oil Co., 160 La. 52, 106 So. 672 (La. 1925); Bushnell v. Artis, 445 So.2d 152 (La. App. 3d Cir. 1984).

The trial court will have to determine factually whether or not a trespass took place, and if there was a trespass, whether such was in good

or bad faith. It was clearly error for the trial court to rule as a matter of law that the plaintiff can not seek to have the encroachment removed if he proves the necessary elements for such relief. That relief is not precluded in this case by the order of the Commissioner of Conservation regarding the unit and unit well location and specifications. Consequently, the ruling of the trial Court granting a partial summary judgment to defendants, precluding the removal of the well insofar as it encroaches on plaintiff's property, is reversed. However, we find no error in the trial judge allowing the well to continue in operation until this matter is finally resolved.

For the foregoing reasons, we re-

mand this case to the trial court for resolution of the remaining issues. Costs of this appeal are assessed against all appellees, with the exception of the Commissioner of Conservation.

AFFIRMED IN PART, REVERSED IN PART, REMANDED.

FOOTNOTES

[1]Plaintiff moved for summary judgment that defendants trespassed on his property, for an order directing them to remove the trespass, and for an injunction enjoining them from remaining on the property. The trial judge denied this motion and plaintiff appealed. Under LSA-C.C.P. art. 968,plaintiff can not appeal the denial of a motion for summary judgment. We, therefore, will not entertain this part of his appeal.

[2]Obviously, if the landowner has conveyed the right to explore or drill to another, it would be necessary to obtain permission to explore or drill from that person.

APPENDIX C

ADAM G. NUNEZ	*	NUMBER 253, 360,-
	*	DIVISION "F"
	*	
	*	NINETEENTH JUDICIAL
VERSUS	*	DISTRICT COURT
	*	
	*	PARISH OF EAST BATON
	*	ROUGE
MAINOCO OIL & GAS	*	
COMPANY ET AL	*	STATE OF LOUISIANA

* *

ORAL REASONS FOR JUDGMENT

THE HONORABLE LEWIS S. DOHERTY, III, JUDGE
AD HOC PRESIDING

FRIDAY, FEBRUARY 10, 1984

I have had an opportunity to review all of the matters before the Court and I would be the first to admit--I'm sure somebody might use this on appeal--that I'm no expert authority in mineral matters. I believe I have a fair grasp from all of the arguments made by counsel and, first, I would say that the constitution envisions that the Commissioner of Conservation is granted broad authority insofar as his ability to create unitization units and effectively control the withdrawal of hydrocarbons from the ground under the various areas of the reservoir which, of course, may include properties in which conceivably there is no authority to drill under. Therefore, I feel that the Commissioner has considerable authority and, from what I have understood from not only the pleadings but the exhibits offered, he has not exceeded his authority. It is very difficult for the Court to conceive that the operator not only did not have a lease but the drilling permit did not specifically authorize--although it may have conceivably contemplated, possibly, that the well would eventually be bottomed under Mr. Nunez'

property, I think there is no specific authorization under the permit to drill on his property so the Court frankly would be hard pressed to find that there was no trespass here, even considering that the Commissioner has this great authority.

The Court feels it's obvious that it would be improper to require that the operator and the lessees remove the well from the property. Not only would it be impractical but I think it would be completely unreasonable Consequently, based on the Court's general determinations here, the motion of the plaintiff is denied insofar as his request requiring that they remove or be evicted from his property and remove the well.

The Court grants the motion of the defendants insofar as Mr. Nunez' demand for removal of the well and, however, reserves the right to Mr. Nunez to proceed in connection with any claim for any damages he may have as a result of the trespass. That's the Court's ruling on it. I'm denying the motion for summary judgment by Mr. Nunez; I grant the motion for summary judgment filed by the defendants, limited to the issue regarding the removal of the well and that aspect of the case, of course, reserving Mr. Nunez any claim that he may have insofar as damages for trespass if upon trial of the matter it is felt that there is a trespass. What I am saying is Mr. Nunez' action against the defendants is limited to one in damages. That's it in a nutshell. I don't think you have the right to make them remove the well.

A TRUE COPY
(signed)
By Clerk of Court

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(signed)
By Clerk of Court

APPENDIX D

CITATION TO CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED--THE PERTINENT TEXT OF WHICH IS SET FORTH AS APPENDIX D

1. "No person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation." U. S. Constitution-Fifth Amendment.

2. "...nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws". U. S. Constitution, 14th Amendment.

3. Every person has the right to acquire, own, control, use, enjoy, protect and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.

Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question. In every expropriation a party had the right to trial by jury to determine compensation and the owner shall be compensated to the full extent of his loss. No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise. However, a municipality may expropriate a utility within its

jurisdiction. Person effect, other than contraband, shall never be taken. Louisiana Constitution, Article 1 Section 4.

4. A law can prescribe only for the future, it can have no retrospective operation, nor can it impair the obligation of contracts. LSA CC 8.

5. No section of the Revised Statues is retroactive unless it is expressly so stated. LSA R.S. 1: 2

6. JURISDICTION AND POWERS OF COMMISSIONER; RULES AND REGULATIONS

A. The commissioner has jurisdiction and authority over all persons and property necessary to enforce effectively the provisions of this Chapter and all other laws relating to the conservation of oil or gas.

B. The commissioner shall make such inquiries as he thinks proper to determine whether or not waste, over which he has jurisdiction, exists or is imminent. In the exercise of this power the commissioner has the authority: To collect data; to make investigations and inspections; to examine properties, leases, papers, books, and records; to examine, survey, check, test, and gauge oil and gas wells, tanks refineries, and modes of transportation; to hold hearings; to provide for the keeping of records and the making of reports; and to take any action as reasonably appears to him to be necessary to enforce this Chapter.

C. The commissioner has authority to make after notice and hearing as provided in this Chapter, any reasonable rules, regulations and orders that are necessary from time to time in the proper administration and enforcement of this Chapter, including rules, regulations, or orders for the following purposes:

(1) To require the drilling, casing, and plugging of wells to be done in such a manner as to prevent the excape of oil or gas out of one stratum to another; to prevent the intrusion of water into oil or gas strata; to prevent the pollution of fresh water supplies by oil, gas, or salt water; and to require reasonable bond with security for the performance of the duty to plug each dry or abandoned well.

(2) To require the making of reports showing the location of all oil and gas wells, and the filing of logs, electrical surveys, and other drilling records.

(3) To prevent wells from being drilled, operated, and produced in a manner to cause injury to neighboring leases or property.

(4) To prevent the drowning by water of any stratum or part thereof capable of producing oil or gas in paying quantities, and to prevent the premature and irregular encroachment of water which reduces, or tends to reduce, the total ultimate recovery of oil or gas from any pool.

(5) To require the operation of wells with efficient gas-oil ratios, and fix these ratios.

(6) To prevent blow outs, casing and seepage in the sense that conditions indicated by these terms are generally understood in the oil and gas business.

(7) To prevent fires.

(8) To identify the ownership of all oil or gas wells, producing leases, refineries, tanks, plants, structures, and all storage and transportation equipment and facilities.

(9) To regulate the shooting and chemical treatment of wells.

(10) To regulate secondary recovery methods, including the introduction of gas, air, water, or other substances into producing formations.

(11) To limit and prorate the production of oil or gas or both from any pool

or field for the prevention of waste.

(12) To require, either generally, or in or from particular areas, certificates of clearance or tenders in connection with the transportation of oil, gas, or any product.

(13) To regulate the spacing of wells and to establish drilling units, including temporary or tentative spacing rules and drilling units in new fields.

(14) To require interested persons to place uniform meters of a type approved by the commissioner wherever the commissioner designates on all pipelines, gathering systems, barge terminals, loading racks, refineries, or other places necessary or proper to prevent waste and the transportation of illegally produced oil or gas. These meters shall be under the supervision and control of the department of conservation. It shall be a violation of this Chapter, subject to the penalties provided in R.S. 30:18, for any person to refuse to attach or install a meter when ordered to do so by the commissioner, or in any way to tamper with the meters so as to produce a false or inaccurate reading, or to have any device through which the oil or gas can be passed around the meter, unless expressly authorized by written permit of the commissioner.

(15) To require that the product of all wells shall be separated into so million many cubis feet of gaseous hydrocarbons and barrels of liquid hydrocarbons, either or both, and accurately measured wherever separation takes place. Gaseous hydrocarbon measurement shall be corrected to ten ounces above atmospheric pressure. Liquid hydrocarbons shall be measured into barrels of forty-two gallons each. Both measurements shall be corrected to sixty degrees fahrenheit.

(16)a. To regulate by rules, the

drilling, casing, cementing, disposal interval, monitoring, plugging and permitting of disposal wells which are used to inject waste products in the subsurface and to regulate all surface and storage waste facilities incidental to oil and gas exploration and production, in such a manner as to prevent the escape of such waste product into a fresh ground water acquifer or into oil or gas strata; and may require reasonable bond with security for the performance of the duty to plug each abandoned well or each well which is of no further use.

Provided that before a permit to operate a new commercial operations' waste disposal well may be granted, a public hearing shall be held on the application for a permit and shall fix the date, time, and place therefor. The operator or owner, prior to such public hearing, shall give public notice on three separate days within a period of thirty days prior to the public hearing, with at least five days between each publication of the notice, both in the official state journal and in the official journal of the parish in which the well is to be located, that application for a permit for a new commercial operations' waste disposal well has been made and that a public hearing on the matter will be held on the date and at the time and place which shall be stated in the public notice. The assistant secretary shall prescribe the form of the advertisement. In addition, the applicant for a permit shall place an advertisement in the same newspapers but not in the classified advertisement or public notice section of the newspapers, in a form which shall be not less than one-half page in size and printed in bold face type; which shall inform the public that application

for a permit has been made for a new commercial operations' waste disposal well and that a public hearing, at which all interested persons are charged to be present and to present their views and which shall state the date, time, and place at which the meeting will be held. The content of both the public notice and the one-half page announcement or advertisement also shall include the name of the owner or operator; location of the proposed well, materials to be disposed in the well, a statement that comments may be sent to the assistant commissioner of the Office of Conservation prior to the public meeting, and the mailing address of the assistant secretary.

"Commercial operations as defined in this Section pertains to those who dispose of waste materials off the site where produced by others. "Waste materials" is defined as any material, excluding drilling muds, produced waters and crude oil residues, for which no use or reuse is intended and which is to be discarded.

c. To regulate the hours of operation of offsite treatment, storage and disposal facilities for waste material as defined in Subparagraph (b) of this Paragraph.

(17) To regulate the construction design and operation of pipelines transmitting carbon dioxide to serve secondary and tertiary recovery projects for increasing the ultimate recovery of oil or gas, including the issuance of certificates of public convenience and necessity for pipelines serving such projects approved hereunder. No person shall exercise the right of expropriation under the laws of this state in connection with the construction or operation of such a carbon dioxide pipeline until the enhanced recovery project has been approved by the commissioner and a certificate of public convenience and

necessity for the pipeline has been issued.

Amended by Acts 1976, No. 122 Section 3; Acts 1979, No. 378, Section 1; Acts 1979, No. 461, Section 1; Acts 1981, No. 760, Section 2; Acts 1982 No. 139, Section 1.

D. The assistant secretary shall make, after notice and public hearing as provided in this Chapter, any reasonable rules, regulations, and orders that are necessary;

(1) To require that all pipelines, excluding field transmission, flow, and gathering lines; all wells; and all associated structures, including any fittings, tie-overs, appliances, and equipment, which are constructed on state waterbottoms pursuant to the grant of a right-of-way by the secretary of the Department of Natural Resources or the issuance of a lease by the State Mineral Board shall conform to the following provisions:

(a) The owner or operator of a pipeline constructed on a right-of-way granted on state waterbottoms shall be responsible for burying the line to a depth consistent with pipeline safety regulations promulgated by the office of the conservation and for maintaining it at said depth to the extent feasible and practical, as determined by the assistant secretary, taking into account the changes wrought by natural forces.

(b) Upon abandonment of a pipeline, well, or associated structure, the owner, or operator thereof shall be responsible for removing any related object above the mudline so as to avoid constituting an obstruction or hazard to navigation or shrimping, or shall adequately mark it for the duration of the obstruction according to regulations of the United

State Coast Guard and regulations promulgated by the assistant secretary. If necessary for environmental or safety reasons, the owner of an abandoned buried pipeline, well or associated structure; or portions thereof shall cause removal of that which constitutes an obstruction or hazard to navigation or shrimping, as determined necessary by the assistant secretary after a public hearing.

(c) If an inspection by the office of conservation discloses an exposed pipeline, the owner thereof shall be required to rebury the line at its original depth, to remove the pipeline, or to install and maintain for the duration of the line adequate marking in accordance with rules and regulations of the United States Coast Guard, United States Corps of Engineers, and the office of conservation. The appropriate course for such remedial action shall be made by the commissioner after a public hearing taking into account environmental and safety issues. 2)

(d) If determined by the governor and the secretary of the Department of Natural Resources to be in the best interests of the state, the owner or operator of a pipeline, well, or associated structure shall not be required to have it removed but shall be required to adequately mark it for the duration of the obstruction according to regulations of the Coast Guard and of the assistant secretary.

(e) At regular intervals subsequent to the abandonment of any pipeline, well, or associated structure constructed on a right of way or lease established on state waterbottoms, the owner or operator of such facility shall cause and be responsible for inspection of that property if the assistant secretary re- 3)

requires it to ensure compliance with applicable rules and regulations of state and federal agencies. The assistant secretary shall require an inspection if he determines that the public interest requires that an inspection is necessary.

(f) A person shall not construct any pipeline, well, or associated structure on a right of way or lease established on state waterbottoms unless he has obtained a permit from the assistant secretary prior to the initiation of construction.

(g) An owner or operator of any pipeline, well, or associated structure constructed on state waterbottoms pursuant to a right of way or lease shall report to the assistant secretary any activities, incidents, developments, or accidents creating an obstruction or hazard to navigation or shrimping, and any permanent abandonments.

To require that all field transmission, flow, and gathering lines constructed on state waterbottoms pursuant to the grant of a right of way by the secretary of the Department of Natural Resources or the issuance of a lease by the State Mineral Board shall meet all requirements of the United States Army Corps of Engineers for burial and shall be located, installed, marked, and maintained in a proper manner, to be approved by the assistant secretary, so as to minimize risk to the public, including mariners and shrimpers,

To require that all equipment, machinery, and materials associated with the construction, operation, maintenance, or abandonment of all pipelines,

including field transmission, flow, and gathering lines; all wells; and all associated structures, which are constructed on state waterbottoms pursuant to the grant of a right of way by the secretary of the Department of Natural Resources or the issuance of a lease by the State Mineral Board shall conform to the following provisions:

(a)(i) The owner or operator of a pipe line, well, or associated structure constructed on a right of way or lease upon state waterbottoms shall cause and be responsible for inspection of that property if the assistant secretary requires it to determine whether any equipment, machinery, or material associated with activity on the lease or right of way, including sunken boats and barges, has been discarded or abandoned above the mudline. The assistant secretary shall require an inspection if he determines that the public interest requires that an inspection is necessary:

(ii) If the inspection reveals any equipment, machinery, or material above the mudline, the owner shall be responsible for its removal to avoid its constituting an obstruction or hazard to navigation or shrimping. However, the assistant secretary may by rule grant such exceptions or variances from this requirement if the location of the equipment, machinery or material would cause removal to be extraordinarily onerous or impractical. Moreover, removal shall not be required if the

governor and the secretary of the Department of Natural Resources determine that in the best interests of the state removal shall not be required. However, the owner shall be required to mark it for the duration of the obstruction according to regulations of the Coast Guard and the Assistand secretary.

(b) The owner or operator of any pipeline, well, or associated structure shall promptly notify and report to the assistant secretary concerning any discarded or abandoned equipment, machinery, or materials, including sunken barges and boats, known to be remaining on state waterbottoms, as a result of activities conducted pursuant to a state right of way or lease. He shall also report to the assistant secretary the removal of any such equipment, machinery, or materials.

(4) The provisions of this Subsection shall be limited to their scope and application to those leases and rights of way existing on state waterbottoms within the area delineated by the coastal zone of Louisiana as described in R.S. 49:213.4.

(5) To provide that the office of conservation shall conduct such inspections as the assistant secretary may deem necessary or appropriate in carrying out the provisions of this Subsection.

Added by Acts 1979, No. 673, Section 1. Amended by Acts 1983, No. 664, Section 1, eff. July 21, 1983.

E. The commissioner shall make, after notice and public hearing as provided in this Chapter, any reasonable rules, regulations and orders that are necessary to require that all other pipelines not covered by Subsection D of this section, together with any fittings, tie-overs, appliances, and equipment, which are constructed in this state shall be buried, maintained or removed from the right of way or lease according to the following provisions:

(1) Pipelines in active use and those not in active use but whose owner anticipates re-use shall be buried to a depth consistent with pipeline safety regulations promulgated by the office of conservation and shall be maintained during the course of the useful and active life of the lines at a depth determined by the commissioner to be substantially equivalent to the original depth of burial. The commissioner may by rule grant such exceptions or variances from this provision as may be necessary for pipelines buried under navigable streams or water bottoms as provided for in Subsection D of this section;and

(2) When a pipeline is abandoned, the commissioner shall make a preliminary investigation to determine if the line, or any portion thereof, constitutes a hazard to the public health or safety, or if allowed to remain in its present state will constitute such a hazard. If the initial determination of the commissioner is that corrective action or removal of pipeline, or any portion thereof, is necessary to eliminate or prevent the hazard and if the owner of the pipeline does not agree with the commissioner's determination and to abide by it, the commissioner shall call a public hearing for the purpose of determining finally what action, if any, he will require the owner of the pipeline to take.

(3) Field transmission, flow and gathering lines shall be installed, located, marked, maintained, and after abandonment, removed,

in a proper manner, to be approved by the commissioner, so as to minimize risk to the public, including mariners and shrimpers.
Added by Acts 1979, No. 674, Section 1.

F. For the purposes of Subsection E, the word "pipeline" shall mean all intrastate pipelines used in the transportation of oil and gas, including by-products and waste therefrom, but shall not include field transmission, flow, and gathering lines, except as provided in Subsection E(3). The Commissioner shall require each pipeline operator to employ in his periodic inspection of the line, which shall be not less than once each year, a procedure to determine the depth of cover over the line and to report such information to the commissioner; however, the commissioner may by rule grant such exceptions or variances from this requirement as may be necessary for pipelines buried or installed in locations where such a requirement would be extraordinarily onerous or impractical. The Commissioner shall further require the owners of all pipelines in the state to notify the office of conservation of the abandonment of said pipeline or non-use of said pipeline for a period of six months or more.

Added by Acts 1979, No. 674, Section 1.

G. The office of conservation of the Department of Natural Resources through the commissioner is hereby authorized and empowered to exercise the safety jurisdiction over interstate pipelines pursuant to the regulations adopted by the United States Department of Transportation and is authorized to notify the United States Department of Transportation of its intent

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to do so. The office shall further implement the provisions of Subsections D, E, F of this Section in so far as those requirements may be consistent with the regulations for interstate pipelines adopted by the United States Department of Transportation. In such event, the office shall further implement the provisions of Subsections D, E, and F of this Section insofar as those requirements may be consistent with the regulations for interstate pipelines adopted by the United States Department of Energy.

Added by Acts 1979, No. 674, Section 1.

H. Any pipeline owner required to construct a levee, dam or weir in connection with a pipeline, shall maintain that levee, dam or weir in a condition as near as practicable to its original condition, however, the commissioner may grant such exceptions or variances from this requirement if he determines that maintenance of the dam, levee or weir no longer serves the purposes intended and will not serve to protect the environment of the area. The commissioner may require the owner to inspect the levee, dam, or weir on a periodic basis and to file reports of such inspections. The commissioner may order the removal or alteration of any such dam, levee, or weir when he determines that such action is necessary to protect the public health, safety or navigation.

Added by Acts 1979, No. 674, Section 1.

I. The commissioner shall make, after notice and public hearing as provided in this Chapter, any reasonable rules, regulations, and orders that are necessary

to control the offsite disposal at commercial facilities of drilling mud, saltwater and other related nonhazardous wastes generated by the drilling and production of oil and gas wells. Such regulations shall contain provisions identifying the waste materials to be regulated. Such regulations shall be at a minimum require:

(1) Every person who intends to open and operate a new offsite commercial facility for the disposal of nonhazardous waste produced in oil and gas drilling operations, shall file an application, with the office of conservation for a permit to conduct such operation.

(2) At least thirty days prior to filing such application with the office, the applicant shall publish a notice of intent to file the application, which notice shall contain sufficient information to identify the applicant, the proposed site at which disposal operations will occur, the nature and content of the waste streams to be disposed of, and the method of disposal to be used. Such notice shall be published on three separate days in the official journal of the parish in which the proposed facility will be located, and in the official journal of the state, not less than one quarter of a page in size and printed in boldface type.

(3) Upon notice to the applicant by the office of conservation that the application is complete, the applicant shall file with the local governing authority of the parish in which the proposed facility is to be located, six copies of the complete application.

(4) Upon acceptance of the application as complete, the office of conservation shall publish in the next available issue of the State Register,

a notice of the filing and the location, date and time of a public hearing to be held in the affected parish, which hearing shall not be less than thirty days from the date of notice in the Register. The applicant shall publish a substantially similar notice in the official journal of the parish affected on three separate days at least fifteen days prior to the date set by the office of conservation for such public hearing. Such notice shall be not less than one quarter page in size in boldface type.

(5) The public hearing shall be fact-finding in nature and shall not be subject to the procedural requirements of the Louisiana Administrative Procedures Act[1] relative to rule making or adjudication, provided that the office of conservation shall allow any interested person to present testimony, facts or evidence related to the application, and shall make a record of the hearing.

(6) Standard applicable to generators of such waste materials.

(7) Criteria for the location, design and operation of commercial offsite disposal facilities.

(8) A manifest system for all wastes transported from site of generation to a commercial offsite disposal facility.

(9) The closure of all commercial offsite disposal facilities in a manner approved by the commissioner to insure protection of the public and the environment.

(10) Bonding to insure the adequate closure of any commercial offsit disposal facility.

(11) Evidence of financial responsibility acceptable to the commissioner for any liability for damages which may be caused by the escape or discharge of waste materials from a commercial offsite disposal facility.

(12) All existing commercial offsite disposal facilities to comply with the criteria in such regulations within a specified time.

Added by Acts 1980, No 804, Section 1.

LSA R.S. 30:4

Section 9 PRODUCTION FROM POOL; DRILLING UNITS; EQUITABLE SHARE; RULES AND REGULATIONS

A. Whether or not the total production from a pool be limited or prorated, no rule, regulation, or order of the commissioner shall in terms or effect:

(1) Make it necessary for the producer from, or the owner of, a tract of land in the pool, in order that he may obtain the tract's just and equitable share of the production of the pool, as that share is set forth in this Section, to drill and operate any well or wells on the tract in addition to the well or wells that can without waste produce this share, or

(2) Occasion net drainage from a tract unless there be drilled and operated upon the tract a well or wells in addition to the well or wells thereon that can without waste produce the tract's just and equitable share of the production of the pool.

B. For the prevention of waste and to avoid the drilling of unnecessary wells, the commissioner shall establish a drilling unit or units for each pool, except for those

pools which prior to July 31, 1940, had been developed to an extent and where conditions exist making it impracticable or unreasonable to use a drilling unit at the present stage of development. A drilling unit, as contemplated herein, means the maximum area which may be efficiently and economically drained by one well. This unit shall constitute a developed area as long as a well is located thereon which is capable of producing oil or gas in paying quantities.

C. Each well permitted to be drilled upon a drilling unit hereafter established shall be drilled at the location designated by the commissioner of conservation, after public hearing, in the order creating the unit. The commissioner of conservation shall consider all available geological and engineering evidence and shall provide for the unit well to be located at the optimum position in the drilling unit for the most efficient and economic drainage of such unit with such exceptions as may be reasonably necessary where topographical conditions exist that would make such a location of the unit well unduly burdensome or where the designated unit well was drilled or commenced prior to the creation of the drilling unit; provided, however, the commissioner of conservation shall fix the well location for each drilling unit so that the producer thereof shall be allowed to produce no more than his just and equitable share of the oil and gas in the pool, as this share is set forth in this Section.

D. Subject to the reasonable necessities for the prevention of waste, and to reasonable adjustment because of structural position, a producer's just and equitable share of the oil and gas in the pool, also referred to as a tract's just and equitable share, is that part of the authorized production of the pool, whether it be the total which could be produced without any restriction on the amount of production, or whether

it be an amount less than that which the pool could produce if no restriction on amount were imposed, which is substantially in the proportion that the quantity of recoverable oil and gas in the developed area of his tract or tracts in the pool bears to the recoverable oil and gas in the total developed area of the pool, inso far as these amounts can be practically ascertained. To that end, the rules, regulations, and orders of the commissioner shall be such as will prevent or minimize reasonably avoidable net drainage from each developed area, that is, drainage not equalized by counter drainage, and will give to each producer the opportunity to use his just and equitable share of the reservoir energy. In determining each producer's just and equitable share of the production authorized for the pool, the commissioner is authorized to give due consideration to the productivity of the well or wells located thereon, as determined by flow tests, bottom hole pressure tests, or any other practical method of testing wells and producing structures, and to consider other factors and geological and engineering tests and data as may be determined by the commissioner to be pertinent or relevant to ascertaining each producer's just and equitable share of the production and reservoir energy of the field or pool.

Amended by Acts 1960, No. 442, Section 1..

E. The term "pool" in this Section as herein defined will only apply to this Section hereof and no other provisions of the law. "Pool" means an underground reservoir containing a common accumulation of crude petroleum oil or natural gas or both. Each zone of a general structure which is completely separated from any other zone in the structure is covered by the term "pool". To promote the development and production of

marginally commercial sands, a zone may contain one or more common accumulations and the overall stratigraphic interval of the zone may be considered and treated as a pool.

LSA R.S. 30:9

Section 10. AGREEMENTS FOR DRILLING UNITS; POOLING INTERESTS; TERMS AND CONDITIONS; EXPENSES

A. When two or more separately owned tracts of land are embraced within a drilling unit which has been established by the commissioner as provided in R.S. 30:9B, the owners may validly agree to pool their interests and to develop their lands as a drilling unit.

(1) Where the owners have not agreed to pool their interests, the commissioner shall require them to do so and to develop their lands as a drilling unit, if he finds it to be necessary to prevent waste or to avoid drilling unnecessary wells.

(a) All orders requiring pooling shall be made after notice and hearing. They shall be upon terms and conditions that are just and reasonable and that will afford the owner of each tract the opportunity to recover or receive his just and equitable share of the oil and gas in the pool without unnecessary expense. They shall prevent or minimize reasonable avoidable drainage from each developed tract which is not equalized by counter drainage.

(b) The portion of the production allocated to the owner of each tract included in a drilling unit formed by a pooling order shall, when produced be considered as if it had been produced from his tract by a well drilled thereon.

(c) In the event pooling is required, the cost of development and

operation of the pooled unit chargeable by the operator to the other interested owners shall be limited to the actual reasonable expenditures required for that purpose, including a charge for supervision. In the event of a dispute relative to these costs, the commissioner shall determine the proper costs, after notice to all interested persons and a hearing.

B. Should the owners of separate tracts embraced within a drilling unit fail to agree upon the pooling of the tracts and the drilling of a well on the unit, and should it be established by final and unappealable judgment of court that the commissioner is without authority to require pooling as provided for in Subsection A, the, subject to all other applicable provisions of this Chapter, the owner of each tract embraced within the drilling unit may drill thereon. The allowable production therefrom shall be such proportion of the allowable for the full unit as the area of the separately owned tract bears to the full drilling unit. LSA R.S. 30:10

Section 6. RIGHT TO SEARCH FOR FUGITIVE MINERALS; ELEMENTS OF OWNERSHIP OF LAND

Ownership of land does not include ownership of oil, gas, and other minerals occurring naturally in liquid or gaseous form, or of any elements or compounds in solution, emulsion, or association with such minerals. The landowner has the exclusive right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership.

LSA R. S. 31:6

Section 8. LANDOWNER'S RIGHT OF ENJOYMENT FOR MINERAL EXTRACTION

A landowner may use and enjoy his property in the most unlimited manner for the purpose of discovering and producing minerals, provided it is not prohibited by law. He may reduce to possession and ownership all of the minerals occurring naturally in a liquid or gaseous state that can be obtained by operations on or beneath his land even though his operations may cause their migration from beneath the land of another.

Acts 1974, No. 50, Section 8, eff. Jan. 1, 1975.
LSA R.S. 31:8

Section 10. LIABILITY TO OTHERS WITH INTERESTS IN COMMON RESERVOIR OR DEPOSIT.

A person with rights in a common reservoir or deposit of minerals may not make works, operate, or otherwise use his rights so as to deprive another intentionally or negligently of the liberty of enjoying his rights, or that may intentionally or negligently cause damage to him. This Article and Article 9 shall not affect the right of a landowner to extract liquid or gaseous minerals in accordance with the principle of Article 8.

Acts 1974, No. 50, Section 10, eff. Jan. 1, 1975
LSA R.S. 31:10

Section 14. DRAINAGE OF FUGITIVE MINERALS; EXCLUSION OF LIABILITY: EXCEPTIONS

A landowner has no right against another who causes drainage of liquid or gaseous minerals from beneath his property if the drainage results from drilling or mining operations on other lands. This does

not affect his right to relief for negligent or intentional waste under Articles 9 and 10, or against another who may be contractually obligated to protect his property from drainage.

Acts 1974, No. 50, Section 14,
eff. Jan. 1, 1975.
LSA R.S. 31:14

Section 15: RIGHT OF LANDOWNER TO CONVEY, RESERVE, OR LEASE RIGHT TO EXPLORE AND DEVELOP

A landowner may convey, reserve, or lease his right to explore and develop his land for production of minerals and to reduce them to possession.

Acts 1974, No. 50, Section15,
eff. Jan. 1, 1975.
LSA R.S. 31:15

Section 164. CREATION OF MINERAL SERVITUDE BY CO-OWNERS OF LAND

A co-owner of land may create a mineral servitude out of his undivided interest in the land, and prescription commences from the date of its creation. One who acquires a mineral servitude from a co-owner of land may not exercise his right without the consent of the other co-owner of the land.

Acts 1974, No. 50, Section 164,
eff. Jan 1, 1975
LSA R. S. 164

Section 166. GRANTING OF MINERAL LEASE BY CO-OWNER OF LAND

A co-owner of land may grant a valid mineral lease as to his undivided interest in the land but the lessee may not exercise his rights thereunder without consent of the other co-owner of the land.

Acts 1974, No. 50, Section 166
eff. Jan. 1, 1975.

Section 177. CO-OWNER OF MINERAL LEASE MAY NOT OPERATE INDEPENDENTLY EXCEPT TO PREVENT WASTE, DESTRUCTION, OR TERMINATION

A co-owner of the lessee's interest in a mineral lease may not independently conduct operations or, except as provided in this article and Article 171, deal with the interest without the consent of his co-owner. He may act to prevent waste, destruction, or termination of the lease and to protect the interest of all, but cannot impose upon his co-owner liability for any costs or expenses except out of production. In so acting he must act in good faith and must deal with the interest of the remaining owner or owners in the manner of a reasonably prudent lessee whose interest is not subject to co-ownership.

Acts 1974, No. 50, Section 177,
eff. Jan. 1, 1975.
LSA R.S. 31:177

STATE OF LOUISIANA : AFFIDAVIT OF FILING
PARISH OF CALCASIEU : AND OF SERVICE

BEFORE ME, the undersigned Notary Public, duly commissioned and qualified within and for the State and Parish aforesaid, personally came and appeared

ADAM G. NUNEZ

who, being by me first duly sworn, deposed and said:

THAT appearer is an attorney at law and is appealing to the United States Supreme Court in proper person the matter of Adam G. Nunez vs. Wainoco Oil & Gas Company et al;

THAT the jurisdictional statement relating to this appeal is being filed with the United States Supreme Court by depositing same in the United States Government mail and/or United States Post Office with first class postage prepaid and properly addressed to the Clerk of the United States Supreme Court within the time allowed for filing, the depositing of said jurisdictional statement in the United States Government mail taking place this 18th day of August 1986;

THAT service of this jurisdictional statement is made upon Wainoco Oil & Gas Company, Tidewater Realty, Inc., Tidewater Barges Inc., Wilshire Oil & Gas Company of Texas, Southern Cross Limited of Colorado, C.D.C. Producing Company, Williams Exploration Inc., The John W. Mecom Company, Cynthia Todd Hendon, Ronald E. Martin, Guy V. Land, Remuda Corporation, Lawrence Baker, Jr., H. T. Freeman, Trustee, Joe Ramos, Trustee, William W. Wilson, Trustee, A.K. Mittelstaedt, Trustee, Robert E. Miller, Irvin Pollack, John C. Kinard, Dan W. Williams, Andrew R. Fish, Harry Dernick, Dernick Resources Inc., Marinex Petroleum Company, Roger & Company, and Wynn & Associates through their Counsel of Record upon Liskow & Lewis, attorneys at law,

attention: Lawrence Simon, Robert Jordan, Kerry N. Massari and Martha Q. Thomas at post office box 52008, O.C.S., Lafayette, Louisiana 70505, upon Exchange Oil & Gas Corporation, their Counsel of Record, Peter Monrose, Esq., at 24th Floor, 1250 Poydras Street, New Orleans, Louisiana 70112, upon Leon County Development Company, Inc., and Cameron Development Company, Inc., through their counsel of record upon John McCollam, Esq., 2450 Pan American Life Center, Suite 2450, New Orleans, Louisiana 70130 and Edmund McCollam, Esq., at Post office box 1548, Houma, Louisiana 70360, and upon the Department of Conservation, State of Louisiana, through its Counsel of Record, Veil David Devillier, at Post Office Box 1149, Eunice, Louisiana 70535, said service being made by depositing copies of said jurisdictional statement in the United States Government mails, sufficient postage attached thereto, properly addressed to said counsel who represents all parties to these proceedings, except appearer, who does hereby certify to service being accomplished as aforesaid.

All of the above is accomplished this 18th day of August 1986.

Edmund F. Veazey

SWORN TO AND SUBSCRIBED before me, this 18th day of August 1986, in Sulphur, Calcasieu Parish, Louisiana.

Alberta Lehman

NOTARY PUBLIC

Supreme Court, U.S.
FILED
OCT 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-308

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ADAM G. NUNEZ,
Appellant

v.

WAINOCO OIL & GAS COMPANY, et al.,
Appellees

On Appeal From the Louisiana Supreme Court

MOTION OF APPELLEES TO DISMISS OR AFFIRM

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Development Company, Inc.

October 10, 1986

* Counsel of Record

QUESTIONS PRESENTED

The questions presented for this Court's review in this Motion of Appellees to Dismiss or Affirm are as follows:

I. Whether the appeal in the instant case satisfies the prerequisites set forth for jurisdiction in 28 U.S.C. §1257 and the grounds for consideration provided in Rule 16 of the Supreme Court Rules; and

II. Whether the judgment of the Supreme Court of Louisiana holding that unitization under the Louisiana Conservation Act supersedes in part certain property law concepts, such as trespass, in the interest of conserving the natural resources of the State and of protecting private property interests, or correlative rights, of non-drilling landowners is clearly correct so as not to warrant review by this Court.

PARTIES TO PROCEEDINGS BELOW

In compliance with Rule 28 of the Supreme Court Rules, Appellees offer the following listing naming all parent companies, subsidiaries and affiliates of each corporation which is a party to this proceeding.

Wainoco Oil & Gas Company:

Parent Company: Wainoco Oil & Gas Company

Subsidiaries: Wainoco Oil & Gas Company, Wainoco Oil & Gas Limited, Wainoco Resources, Inc., Wainoco Australia, Inc., Wainoco International, Inc., Wainoco Energy Corporation, and Wainoco Indonesia, Inc.

Tidewater Realty, Inc. and Tidewater Barges, Inc.:

Parent Company: Tidewater Inc.

Domestic Boat Owning Group: Tidewater Marine Service, Inc., Java Boat Corporation, Schopco, Inc., Seafarer Boat Corporation, Tidewater Acquisition, Inc., Tidewater Barges, Inc., Tidewater Enterprises, Inc., Tidewater Fleets, Inc., Tidewater Grand Isle, Inc., Tidewater India, Inc., Tidewater Mediterranean, Inc., Tidewater Navigators, Inc., Tidewater Resources, Inc., Tidewater Traders, Inc., Tidewater Venice, Inc., Tidewater Ventures, Inc., Tidewater Vessels, Inc., Twenty Grand Marine Service, Inc., Twenty Grand Offshore, Inc., Tidewater Marine Pacific, Inc., and TMS Acquisition Corporation.

Foreign Boat Owning Group: Tidewater Caribe, C.A., Equipo Zulia, C.A., Tidewater Marine Service, C.A. (SEMARCA), Tidewater Marine Service, Inc. (U.K.) Limited, Tidewater Marine

West Indies Limited, Tidewater Balboa, Inc., Tidewater Colon, Inc., Tidewater Nautico, Inc., Tidewater Marine Panama, Inc., Tidewater Liberia, Inc., Tidewater Monrovia, Inc., Tidewater Timbo, Inc., Tidewater Cayman, Inc., Tidewater Georgetown, Inc., Pacific Tidewater Marine Ltd., and Pacific Tidewater Pty. Ltd.

Compression Group: Tidewater Compression, Inc., Tidewater Compression Service, Inc., Tidewater Compression NE, Inc., Tide-Air, Inc., Texcentric, Inc., Western Air Drilling Service Co., Colorado Air Drilling, Inc., and R. L. Frailey, Inc.

Domestic Operating Group: Tidex, Inc., Western Boat Operators, Inc., Eastern Boat Operators, Inc., and Tidewater Marine Towing, Inc.

Foreign Operating Group: Tidex Private Limited, Tidex International, Inc., Pan-Marine International, Inc., International Offshore Services (U.K.) Limited, International Offshore Services (Holland) B.V., and Pan-Marine do Brasil Transportes Ltda.

Oil & Gas Group: Tidewater Energy, Inc., Hilliard Oil & Gas, Inc., Tidewater SE Sumatra, Inc., Tidewater NW Java, Inc., Hilliard Properties, Inc. and Tide-Oil, Inc.

Service of Legal Process Company: S.O.P., Inc.

Contractor Services Group: Tidewater Contractor Services, Inc., Tidewater Contractors, Inc., and XPLO Corporation.

Real Estate Group: Tidewater Realty, Inc.

Insurance Group: Pental Insurance Co. Ltd.

Joint Venture Group: Tidewater Port Jackson Marine Pty. Limited, Equipo Mara, C.A., Tidewater Chartering Pty. Ltd., Tidex Nigeria Limited, and Tidex Malaysia Sdn. Bhd.

Wilshire Oil & Gas Company of Texas:

Parent Company: Wilshire Oil Company of Texas

Subsidiaries: San Francisco Oil Company, Dritalta Zenzolano Limited, Wilshire Oil of Canada Limited, and Rockland Resources Company.

Southern Cross Limited of Colorado:

Subsidiaries: Crux, Ltd. and Crux International, Ltd.

C.D.C. Producing Company:

Parent Company: Canterra Petroleum, Inc., the present owner of this interest.

Subsidiaries: Canterra Enterprises, Inc., Canterra Coal, Inc., and Canterra Sulphur, Inc.

Williams Exploration Company:

Parent Company: The Williams Companies

Subsidiaries of The Williams Companies (Affiliates of Williams Exploration Company): Agrico Chemical Company, Agrico Canada Limited/Limitee, Agrico Chemical (Europe), Inc., Agrico Chemical of Oklahoma, Inc., Agrico Disc, Inc., Agrico Egypt Limited, Agrico Foreign Sales Corporation, Agrico Interamericana, S.A., Agrico International Far East, Inc. Agrico-Korea Enterprises, S.A., Nanhae Chemical Corporation,

Agrico North Carolina Properties, Inc., Agrico Overseas Company, S.A., Agrico Overseas Investment Corporation, Agrico Overseas Development Corporation, Agrico Shipping Company, Agrico Thailand, Inc., Agrico Trinidad, Inc., Colag, Inc., Crop Production Services, Inc., Fishhawk Ranch, Inc., The American Agricultural Chemical Company, BancOklahoma Corp., F T & T, Inc., Faustina Pipe Line Company, Langside Limited, Louisiana Resources Company, NGL Production Company, Northwest Alaska Company, Northwest Energy Company, Ap Sci, Inc., Apco Argentina Inc., Apco Properties Ltd., Inner Ocean Services Company, Inner Ocean Services, Inc., Northwest Alaskan Pipeline Company, Northwest Border Pipeline Company, Northwest Canadian Gas Sales Company, Northwest Central Pipeline Corporation, Northwest Coal Corporation, Western Slope Carbon, Inc., Northwest Field Services Company, Northwest International Company, Northwest Argentina Corporation, Northwest Investments, Inc., Northwest Land Company, Northwest Marketing Company, Northwest Overseas Capital Corporation N.V., Northwest International Finance B.V., Northwest International Finance N.V., Northwest Pipeline Corporation, Prairie Pipe Lines Limited, Prairie Transmission Lines Limited, Pacific Northwest Realty Corporation, Northwest Exploration Company, Northwest Canada Exploration Company, Peabody Holding Company, Inc., Scissortail Natural Gas Company, Tulsa Williams Company, Wilco, Inc., Williams Brothers International Corp., Williams Exploration Company, Paraffine-Williams Company, Rainbow Resources, Inc., Williams Drilling Company of Tulsa, Williams Gas Supply Company, Williams Natural Gas Company, Williams Natural Gas Liquids Company, Williams Northwest Corporation, Williams Pipe Line Company, WillBros Terminal Company, Williams Terminals Company, Williams Realty Corp., Atria Hotel, Inc., Cafes On the Ice, Inc., 1400 Market Street, Inc., Kennedy Tower, Inc., Metro Center, Inc., 320 South Boston, Inc., Tulsa Union Depot, Inc., Willcentro, Inc., Williams Center Forum, Inc., Williams Center, Inc., Williams Center Plant, Inc., Williams Center Tower I, Inc., Williams Center

Tower II, Inc., Williams Plaza Hotel, Inc., The Barristers Club, Inc., Williams Real Estate Services, Inc., Williams Realty Developments, Inc., Williams Realty Interest, Inc., Williams Realty of Charlotte, Inc., Writers Square Condominium, Inc., WRC of Colorado, Inc., WRC of Crown Center, Inc., WRC of Kansas, Inc., WRC of San Antonio, Inc., WRC of Texas, Inc., WRC of Utah, Inc., Williams Telecommunications Company, WilTel of Illinois, Inc., WilTel of Kansas, Inc., and Williams Western Pipeline Company.

Southport Exploration Inc.:

This interest is now owned by Prospective Investment and Trading Company, whose parent company is The Pitco Company, and by Anchor Exploration, a sole corporation

The John W. Mecom Company:

Parent Company: The John W. Mecom Company

Subsidaries: Warwick Towers, Inc., Warwick Towers 2 Inc., Warwick Towers Venture, Houston International Hotel, Warwick Hotel Inc., Gran Nudder Limited, M Air, Happy Holiday, Double M Drilling, Circle Bar Salvage, Mecom Columbia, Huila Exploration Company, Mecom Production Inc., Lutcher & Moore Cypress Lumber Company, Bayou Secret, and Lutcher Moore Development.

T. Keith Marks: Not Applicable.

Donald F. Todd: Not Applicable.

Cythnia Todd Hendon: Not Applicable.

Ronald E. Martin: Not Applicable.

Guy V. Land:	Not Applicable.
Remuda Corporation:	Not applicable.
Lawrence E. Barker, Jr.:	Not Applicable.
H. T. Freeman, Trustee:	Not Applicable.
Joe Ramos, Trustee:	Not Applicable.
William W. Wilson, Trustee:	Not Applicable.
A. K. Mittelstaedt, Trustee:	Not Applicable.
Robert E. Miller:	Not Applicable.
Irving Pollack:	Not Applicable.
John C. Kinard:	Not Applicable.
Dan W. Williams:	Not Applicable.
Andrew R. Fish:	Not Applicable.
Harry Dernick:	Not Applicable.
Dernick Resources, Inc.:	
Parent Company:	Dernick Resources, Inc.
Subsidiary:	Pathex Petroleum Inc.
Marinex Petroleum Company:	Not applicable.

Roger and Company: Not applicable.

Wynn & Associates: Not applicable.

Exchange Oil & Gas Corporation:

This interest is now owned by a Texas Limited Partnership called TXP Operating Company.

Knob Hill Oil & Gas Company:

This company now owns a part of the interest formerly owned by Exchange Oil & Gas Corporation.

Leon County Development Company, Inc.:

Not Applicable.

Cameron Development Company, Inc.:

Not Applicable.

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I.

INTRODUCTION

Pursuant to Rule 16.1, the Appellees in the above-entitled matter move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Louisiana Supreme Court on the following grounds. The present case is not within the appeal jurisdiction of this Court, nor does it satisfy the requirements for jurisdiction by writ of certiorari. In addition, the federal questions sought to be reviewed were neither properly raised nor expressly passed on by the courts of Louisiana. This appeal presents no substantial federal question warranting review by this Court. Further, there are clearly adequate non-federal grounds for the decision rendered by the Louisiana Supreme Court. Finally, the questions upon which this cause depends are so unsubstantial as not to require further argument.

The authority of this Court to hear this case must arise under the provisions of 28 U.S.C. §1257 which, in the instant case, would require that the decision rendered by the Louisiana Supreme Court have considered the validity of a state statute as against constitutional attack, or that the opinion have passed upon a federal question impacting on the facts of this case. In fact, neither that ruling nor any of those rendered by the Louisiana courts in this matter mention, discuss or pass upon any federal constitutional questions, with the result that the Court lacks jurisdiction over this case. Accordingly, the appeal should be dismissed and, treating the papers as an application for a writ of certiorari, the writ should be denied. In addition, the substantive regulation of the State's natural resources which the Louisiana Supreme Court has here sustained is well within the framework of permissible state regulation which this Court has previously upheld, and the matter as decided by the Louisiana Supreme Court cannot be said to present a substantial federal question. That court's decision as rendered was based solely upon

an interpretation of state property law, and the judgment clearly rests on an independent and adequate non-federal basis. Finally, a consideration of the facts and of the decision rendered by the Louisiana Supreme Court demonstrates that the questions upon which this cause depends are unsubstantial, that there is an absence of any conflict of opinions, and that the judgment rendered below is so obviously correct as to warrant no further review.

II.

STATEMENT

Although the legal issue before this Court relates to constitutional claims, an explanation of the principles of unitization and of the key facts in the history of the unitization and the drilling of the Wainoco Oil & Gas Company - R.R. Stone No. 1 Well (hereinafter referred to as "the Stone Well") as the unit well for the Lower Abbeville A Sand, Reservoir A, Sand Unit F, Ocean View Beach Field, Cameron Parish, Louisiana, may be helpful to the Court's consideration of the primary issues.

A. OVERVIEW OF COMPULSORY UNITIZATION.

In South Louisiana, generally, and specifically in the Ocean View Beach Field, unitization of separate interests or tracts by the Commissioner of Conservation (often referred to in other juurisdictions as "pooling" or "forced pooling") involves reflecting on a surface map the area that conforms to an outline of the subsurface geology of a pool productive of hydrocarbons. As relates to a single well unit (and not a reservoirwide unit), this area is called a "drilling unit," which means "the maximum area which may be efficiently and economically drained by one well. This unit shall constitute a developed area as long as a well is located thereon which is capable of producing oil or gas in paying quantities." La. R.S. 30:9. *See also* La. R.S. 30:3(1) and 10.

Unitization is designed to prevent waste of the State's natural resources (La. R.S. 30:3(1)), to avoid the drilling of unnecessary wells, to allow all persons owning an interest in a pool to receive their just and equitable share of production from the pool, and to protect the correlative rights of all such owners. Were unitization not available, each owner of a separate tract would have to drill his own well to produce the minerals from beneath his land and to prevent his neighbors' wells from draining his property. This would have the undesirable result of wasting the State's natural resources through the drilling of unnecessary wells and dissipation of reservoir energy.

The unitization procedure at issue in this case is compulsory or forced unitization (La. R.S. 30:10). In forced unitization (also called "forced pooling"), if the Commissioner of Conservation determines that unitization of separately-owned tracts is appropriate, he is required to force pool these tracts and interests and to order the owners to develop their lands as a single, integrated unit, even if various owners disagree and oppose his decision.

When a compulsory unit is created, all of the tracts in the unit are treated as a single entity for the purpose of development, and the drilling of the unit well as a well capable of producing hydrocarbons constitutes the development of the unit. No other wells can be drilled to the unitized sand within the unit (except alternate or substitute unit wells which must be expressly authorized by the Commissioner), and unit operations on the designated tract are considered to be operations on every tract within the unit. In order to maximize recovery from this one unit well and to prevent the loss or waste of reservoir energy and of hydrocarbon reserves, it is critically important to all owners in the unit that the well be located at the optimum geological location for the most efficient drainage from the unit. The legislative grant of power to the Commissioner and the right of the owners in the unit to rely on the power of the Commissioner to authorize and require the location of the unit well at the optimum geological location are the substantive issues that were presented to the Louisiana Supreme Court.

B. ANALYSIS OF THREE CRITICAL EVENTS.

The Appellees are not in agreement with Appellant's incomplete and, in part, inaccurate presentation of the facts. However, in the interest of simplicity, Appellees refer this Court to the description of the pertinent facts as set forth in the opinions of the Court of Appeal and of the Louisiana Supreme Court cited and discussed hereinbelow. For purposes of this Motion, a review of the key facts in light of the function of unitization indicates that the Court's consideration should focus on three critical events: (a) the original unit order; (b) the original and amended well permits; and (c) the Commissioner's order confirming the unit well.

1. The Original Unit Order.

The Commissioner issued Order No. 1095 and 1016-B-2 effective May 20, 1980, creating Sand Unit F, and included a portion of the Appellant's property within that unit. The Commissioner adopted the geology proposed by those owners, including the Appellant, seeking the creation of the unit. The evidence presented by the owners indicated that the highest structural position within Sand Unit F, and therefore the optimum area for the unit well, was located in the western portion of the unit and included the Appellant's tract.

At the time the order was issued, the Stone Well had not been drilled, and the Commissioner designated the location of the unit well by reference to Statewide Order No. 29-E. Reference to Statewide Order No. 29-E has been customary since 1960 when establishing a unit for which a well has not yet been drilled, and both the Court of Appeal and the Louisiana Supreme Court correctly accepted that long-standing practice as a proper method of designating the location of a unit well and complying with La. R.S. 30:9C to assure the drilling of the unit well at an optimum geological location.

Statewide Order No. 29-E (issued in 1957) provides minimum spacing requirements between wells and between wells and property

lines. The order defines "property line" as the boundary dividing tracts on which mineral rights are separately owned, except that when a unit has been created, the order provides that the boundary of the unit shall be considered the "property line" for purposes of the spacing rules. Therefore, when a unit has been created, the Commissioner is not concerned with how close a well is to the boundary between separately-owned tracts within the unit, but with whether the well is a sufficient distance from the unit boundaries to insure that the designated unit area is properly developed and that the well does not drain the area outside of the unit. This is consistent with the function of forced unitization to require the development of the separate tracts as a single, integrated entity.

2. The Original and Amended Well Permits.

Sometime after the unit was established, Wainoco applied for a permit to drill the Stone Well. The permit to drill was duly issued, authorizing Wainoco to spud a well on the surface of the Stone tract and to drill to the unitized sand in compliance with Order No. 1095 and 1016-B-2 and with Statewide Orders Nos. 29-B and 29-E. After the well had been drilled and completed, Wainoco filed a Report of Apparent Deviation with the Office of Conservation showing that the deviation of the well was in compliance with Statewide Order No. 29-B, Section XVIII.

One of the purposes of Statewide Order No. 29-B is to insure that the well bore does not cross the boundaries between separately-owned tracts or, in the case of a unit, the unit boundary. Section XVIII of that regulation generally permits a deviation of the well bore from the vertical up to five degrees and requires the operator of the well to take an inclination survey. The inclination survey is used merely to determine the maximum possible deviation from the vertical for purposes of determining whether the well bore might have crossed a property line. In the case of a unit, Statewide Order No. 29-B, like Statewide Order No. 29-E, defines "property line" as the boundary of the unit.

The inclination survey of the Stone Well established that the bottom hole was well within the five-degree permissible deviation and did not cross the unit boundary. However, since the geological evidence presented to the Commissioner regarding this unit showed that the optimum position for drilling the unit well was in the area of the Appellant's property and the well was permitted accordingly, the five-degree deviation permitted by Statewide Order No. 29-B necessarily created the distinct possibility of drilling under Appellant's property.

It is undisputed that Wainoco, as operator, drilled the Stone Well in compliance with both of these Statewide Orders and in accordance with the geology adopted by the Commissioner. As contemplated by the actions of the Commissioner, the well bore remained entirely within the geographical confines of the unit and the guidelines of the Statewide Orders to develop all of the consolidated tracts as a single, integrated entity.

3. The Commissioner's Order Confirming the Unit Well.

When the Stone Well was completed in and began producing from the unitized sand in December of 1980, no one knew that the well bore was actually located in the subsurface of the Appellant's property. The Appellees knew only that the bottom hole of the well deviated one degree from the vertical and was in compliance with the order establishing Sand Unit F and with Statewide Orders Nos. 29-B and 29-E. However, the Commissioner had occasion to consider the actual bottom-hole location in issuing Order No. 1095-B and 1016-B-3.

On the basis of new geological evidence obtained in the drilling of the Stone Well and another well in the Ocean View Beach Field, and partially in response to a suit filed by Appellant in August of 1981, Wainoco filed a pre-application notice outlining its plan to apply for a public hearing seeking the confirmation of the boundaries of Sand Unit F and of the designation of the Stone Well as the unit well. A pre-application conference relative to the matter was held at

the Appellant's request and was attended by the Appellant's geologist, Mr. Namias. The public hearing was held on June 8, 1982. At that hearing, prior to the issuance of Order No. 1095-B and 1016-B-3, the Commissioner considered the geological and engineering evidence relative to the optimum location of the unit well for Sand Unit F, as well as the objections of Appellant. All of the evidence presented to the Commissioner indicated that the optimum geological location for the Stone Well was, in fact, where the well was located. The Appellant was present and had every opportunity to present evidence to the contrary, yet he did not. Indeed, he has never to this date disputed that the well is located at the optimum geological location for production from the unit. He did appear to remind the Commissioner of his suit, to protest the well as a trespass and to seek its removal. All other parties in the unit supported the order sought by Wainoco.

Had the Commissioner acceded to Appellant, the removal of the well would have resulted in waste by the destruction of a producing well and in a significant decrease in the ultimate recovery of the reserves underlying the unit. Furthermore, because of the stage of reservoir depletion, a substitute unit well probably would not have been economically feasible, and the remaining reserves would be lost and/or drained by the other producing wells in the Ocean View Beach Field to the prejudice of the correlative rights of all parties with interests in the unit, including the Appellant and the other landowners and/or their lessees. For these reasons, all of which are uncontested, and because the well was properly located originally, the Commissioner confirmed the unit configuration and the designation of the unit well and specifically found the order to be "reasonably necessary to conserve the natural resources of the state, to prevent waste as defined by law, to avoid the drilling of unnecessary wells, and otherwise to carry out the provisions of the laws of this state."

III.

PROCEEDINGS BELOW

The Appellant filed this action on January 26, 1982, in the 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana, under Docket No. 253,360-M, against Wainoco Oil & Gas Company, the other owners of working interests in the unit in question, and the Commissioner of Conservation. Appellant alleged that bottoming the Stone Well under his property constituted a trespass, and he sought an injunction ordering the unit operator to remove the well bore. Subsequently, Appellant moved for summary judgment on the issue of his right to an injunction, and the Defendants filed a cross-motion for summary judgment asking that Appellant's suit be dismissed if the court upheld the Commissioner's authority and duty to designate the unit well. The trial judge, the Honorable Lewis S. Doherty, III, denied Appellant's motion, granted the motion for summary judgment on behalf of the Commissioner of Conservation, dismissing the Commissioner as a defendant, and granted partial summary judgment in favor of the Appellees, affirming the Commissioner's refusal to order removal of the well and the right of the Appellees to continue to operate the well as the unit well under the provisions of the Commissioner's orders.

The Appellant appealed that ruling, and the First Circuit Court of Appeal rendered judgment on October 8, 1985, as reported in *Nunez v. Wainoco Oil & Gas Co.*, 477 So.2d 1149 (La. App. 1st Cir. 1985). In that opinion, the Court of Appeal affirmed the motion for summary judgment granted in favor of the Commissioner of Conservation and concluded that "the commissioner was within his authority to issue the unitization order and to designate a unit well thereon." 477 So.2d at 1154. However, with regard to the Appellees, the Court of Appeal ruled that the Commissioner's orders did not and could not authorize drilling on or under unleased property without the consent of the landowner. Thus, although the well in question was the unit well, the Court of Appeal held that its presence

under Appellant's property could constitute a trespass, and the case was remanded to the trial court for determination of whether a trespass in fact took place and, if so, whether the trespass was in good or bad faith. On October 22, 1985, Appellees applied to the Court of Appeal for rehearing, and that motion for rehearing was denied on November 8, 1985.

Following a writ application by Appellees, the Supreme Court of the State of Louisiana granted writs on January 31, 1986. *Nunez v. Wainoco Oil & Gas Co.*, 481 So.2d 1326 (La. 1986). In the opinion rendered in this matter on May 20, 1986,*Nunez v. Wainoco Oil & Gas Co.*, 488 So.2d 955 (La. 1986), the Louisiana Supreme Court framed the issues as follows: (1) Whether the intrusion of a well bore (several inches in diameter) into the earth, at a point two miles beneath the surface, constitutes a trespass on the surface owner's property, where that property is included in a drilling unit created by the Commissioner of Conservation; and (2) Whether, if a protected interest is involved, Louisiana Revised Statutes 30:1 et seq. (which establishes and regulates the Office of Conservation and specifically authorizes the Commissioner to establish drilling units) supersedes the surface owner's right to absolute control of the subsurface as apparently envisioned by Louisiana Civil Code article 490. Put another way, the court was to consider whether the formation of a compulsory unit, as permitted in La. R.S. 30:10, affects the applicable general principles concerning ownership of property and alters the concept of trespass beneath the surface owner's tract.

In its opinion, the court traced the history and development of the Louisiana Conservation Act, as well as the pertinent powers granted to the Commissioner of Conservation by the Louisiana Legislature in that Act pursuant to Article IX of the Louisiana Constitution of 1974. Noting the specific power of the Commissioner to require unwilling or non-consenting owners to pool their interests if he finds it necessary to prevent waste or to avoid the drilling of unnecessary wells, the court found that this concept of unitization embodying the principle of ownership of minerals produced from a common source of supply, co-extensive with the individual ownership of the

overlying land, is a departure from the traditional notions of private property. In addition, the articles relative to ownership contained in the Louisiana Civil Code have been modified in recent years to reflect a qualification of such rights in private property as being expressly "subject to reasonable statutory restrictions and the reasonable exercise of the police power." La. Const. art. I, §4.

The Louisiana Supreme Court held that unitization, which creates rights and interests in a pool of hydrocarbons beyond the traditional property lines, effectively amends Louisiana Civil Code article 490 and other private property laws in the interest of conserving the natural resources of the state and, in effect, of protecting private property interests, or "correlative rights," of non-drilling landowners. Unitization is an appropriate exercise of the police power that has previously been held to be constitutional. The power of the Commissioner of Conservation to unitize includes not only the authority to establish drilling units for each pool, but also to designate a drilling site "at the optimum position in the drilling unit for the most efficient and economic drainage of such unit." La. R.S. 30:9C. Thus, the court concluded that the intrusion into the subsurface two miles beneath the tract owned by Appellant was an authorized unit operation and that, since established private property law concepts, such as trespass, have been superseded in part by Louisiana's Conservation Act when a unit has been created by order of the Commissioner, a legally actionable trespass had not occurred in this instance.

IV.

ARGUMENT

For the reasons set forth below, Appellees contend that the instant case does not warrant plenary consideration by this Court and that summary disposition of this matter is appropriate.

A. THE INSTANT CASE IS NOT WITHIN THIS COURT'S JURISDICTION AND SHOULD BE DISMISSED.

In the Jurisdictional Statement filed with this Court on August 21, 1986, the Appellant notes that this is a direct appeal from a judgment by the Louisiana Supreme Court and that jurisdiction for this appeal is conferred on this Court by, alternatively, one of the three provisions of 28 U.S.C. §1257. In addition, Appellant presents as questions on appeal whether certain acts of the Commissioner of Conservation either violated due process provisions of the Federal Constitution or failed to constitute proper and reasonable exercises of the police powers granted to the Commissioner, and whether provisions of the Louisiana Conservation Act or Mineral Code as interpreted in the decision rendered by the Louisiana Supreme Court violated principles of due process under the Federal Constitution.

Of initial importance is the question of whether this matter may be said to be properly within the jurisdiction of this Court over final judgments or decrees rendered by the highest court of a state as provided in 28 U.S.C. §1257. Considering the opinion by the Louisiana Supreme Court in this matter and the grounds therefor, it is clear that there is no jurisdiction by appeal under 28 U.S.C. §1257(1), as the validity of a treaty or statute of the United States has not been drawn in question, and there has obviously been no decision against one's validity.

The second basis for appeal jurisdiction over state court rulings is contained in 28 U.S.C. §1257(2), which requires that the validity of a statute of the state be drawn in question on the ground that it is "repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." In the present case, at all times prior to the filing of the Jurisdictional Statement, the Appellant failed to properly assert that any statute of the State of Louisiana or, in particular, any provision of the Louisiana Conservation Act or Mineral Code, violated the due process protections of the Federal Constitution. It is also manifest that none of the three opinions

rendered by Louisiana courts in this matter mentioned, discussed or determined any challenge to the validity of a Louisiana statute under the Federal Constitution. Indeed, as acknowledged by Appellant at page 19 of the Jurisdictional Statement, the Louisiana Supreme Court took no action relative to the question of the constitutionality of any statute. Thus, because of the nature and content of the judgment of the Louisiana Supreme Court, the necessary prerequisites to invoking the appeal process pursuant to 28 U.S.C. §1257(2) are not met. In such instances, 28 U.S.C. §2103 provides that the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari. However, in the instant case, this Court would still lack jurisdiction under 28 U.S.C. §1257(3).

Under the provisions of 28 U.S.C. §1257(3), this Court would have jurisdiction by writ of certiorari in the present case if the validity of a state statute was drawn in question on the ground of its being repugnant to federal law or where a title, right, privilege or immunity was set up or claimed "under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." As noted above, the Louisiana Supreme Court did not consider any constitutional attack upon a state statute. In addition, the Louisiana Supreme Court's decision did not pass upon *any* federal question but rather, as demonstrated below, rested solely on an adequate and independent non-federal ground. Thus, because the Louisiana court did not in fact pass on the impact of any federal question upon the facts of this case, this Court also lacks jurisdiction by writ of certiorari and such writ should be denied.

In summary, the instant case fails to satisfy any of the jurisdictional requirements set forth in 28 U.S.C. §1257. The decision rendered by the Louisiana Supreme Court simply does not mention, discuss or pass upon any federal constitutional questions, and the matter was clearly decided solely on the basis of state law. In light of those facts and as will be discussed more fully below, it is evident that this case also presents several other bases for dismissal, *i.e.*, that the federal questions sought to be reviewed were not timely or properly raised and were not expressly passed on below, that the

matter fails to present a substantial federal question, that the judgment below rests on an adequate non-federal basis, and that the questions involved in the matter were properly determined below. In any event, it is clear that this Court lacks either appeal or certiorari jurisdiction in this matter, with the result that the appeal should be dismissed or, alternatively, the writ should be denied.

B. THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE NEITHER PROPERLY RAISED NOR EXPRESSLY PASSED ON BY THE COURTS OF LOUISIANA.

It is essential to the jurisdiction of this Court under 28 U.S.C. §1257 that a substantial federal question have been properly raised in the state court proceedings. Under the statutory requirements, it is necessary that the validity of the state statute have been "drawn in question" or that the federal right have been "specially set up or claimed." It was early established by the Court that the validity of a statute is "drawn in question" only if "the power to enact it, as it is by its terms, or is made to read by construction, is fairly open to denial, and is denied." *Miller v. Cornwall R. Co.*, 168 U.S. 131, 133 (1897). It is not enough to draw a statute into question by controverting rights claimed thereunder, or by disputing an act done by virtue of such statute. *Baltimore & Potomac R. Co. v. Hopkins*, 130 U.S. 210, 226 (1889).

In the present case, as noted above, the Appellant has previously failed to properly assert that any statute, and specifically the Louisiana Conservation Act or Mineral Code, violated the due process provisions of the Federal Constitution. None of the opinions rendered by the Louisiana courts have mentioned, discussed or considered any constitutional attack upon a statute. The Court has stated many times that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the

contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). It is too late, of course, to raise the federal question for the first time in the notice of appeal to the Supreme Court or in the jurisdictional statement. Such papers are not part of the record of the state court proceedings, and it is that record which must affirmatively show a raising of the federal issue in question. *See White River Lumber Co. v. Arkansas ex rel. Applegate*, 279 U.S. 692, 700 (1929). Thus, the Appellant in the present matter has failed to timely or properly raise any federal question as to the subject statutes, and that portion of the appeal should be dismissed on those grounds.

In the Jurisdictional Statement, the Appellant also seeks to assert a federal question in connection with certain acts of the Commissioner of Conservation and the exercise of the police power in connection with the State's natural resources. As noted previously, none of the Louisiana courts rendering opinions in this matter have treated or resolved any such question on a federal constitutional basis. The attempts by Appellant to affirmatively show that this federal question was properly presented reveal only generalized statements and arguments which are vague and, at times, difficult to comprehend. Appellees contend that an issue exists as to whether such questions have been presented "with fair precision." *State of New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

This Court has in the past required reference to the particular clause of the Federal Constitution relied upon, as well as the rights claimed thereunder. In prior rulings, the Supreme Court has held insufficient a mere reference to the "Constitution of the United States", *Herndon v. Georgia* , 295 U.S. 441, 442-43 (1935), or the "Constitution and laws of the United States",*Oxley Stave Co. v. Butler County*, 166 U.S. 648, 654 (1897), or to "due process of law", *Bowe v. Scott*, 233 U.S. 658, 664-65 (1914). The Court, in *Webb v. Webb*, 451 U.S. 493, 496-98 (1981), held it insufficient, in framing a claim under the Full Faith and Credit Clause of the Federal Constitution, simply to assert that a Florida decision "should be accorded full faith and credit" by a Georgia court. Although the

petitioner in that case did use the phrase "full faith and credit" at several points in the proceedings below, she never cited to the Federal Constitution nor to any cases relying on the Full Faith and Credit Clause of the Federal Constitution. In any event, the majority, noting that the Georgia court had not in fact passed upon the impact of the federal question on the facts of the case, concluded that the Court lacked jurisdiction and dismissed the writ of certiorari that had been granted.

In the present case, it is questionable as to whether the federal questions raised in the Jurisdictional Statement are in fact the same as those alluded to in the proceedings below. Here, as in the *Webb* decision, the fact remains that the Louisiana Supreme Court never mentioned, let alone expressly passed upon, any federal question in its decision. On that basis alone, it is evident that this matter should be dismissed because the federal questions sought to be reviewed were neither properly raised nor expressly passed on by the Louisiana court.

C. THIS MATTER PRESENTS NO SUBSTANTIAL FEDERAL QUESTION WARRANTING REVIEW BY THIS COURT.

In the Jurisdictional Statement, the Appellant raises the questions of whether certain acts of the Commissioner of Conservation violated the due process provisions of the Federal Constitution or were not proper and reasonable exercises of the police power, and whether certain Louisiana statutes as interpreted by the Supreme Court of Louisiana were contrary to the federal due process provisions. It is clear from a reading of the opinion rendered by the Louisiana Supreme Court in this case that there exists no substantial federal question warranting consideration by the Court. In point of fact, the ruling of the Louisiana Supreme Court contains no decision of any federal question, but was decided solely upon an interpretation of state law as applicable to these facts. Even considering the federal question claims presented by the Appellant in these proceedings, it is

clear that none of the claims can be said to constitute a substantial federal question, and each arises in connection with questions previously decided by this Court relative to the constitutionality of similar statutes and actions performed thereunder.

While the opinion rendered by the Louisiana Supreme Court did not expressly consider any federal question arising in connection with this matter, an examination of that opinion and a survey of the prior Supreme Court decisions and other jurisprudence pertaining to the questions raised demonstrate that these claims are without substance and clearly do not warrant or require consideration in the disposition of this case. As previously discussed, the Louisiana Supreme Court framed the issues in this matter as whether a legally actionable trespass could occur under the facts presented and whether, if a protected interest was involved, the Louisiana Conservation Act operated to supersede certain private property law concepts as embodied in the Louisiana Civil Code. That opinion contains no mention of or determination as to any federal question involving the protections of the Fourteenth Amendment. Rather, the opinion turns on the effect of the formation of a compulsory unit by the Commissioner of Conservation relative to the property rights of the landowners included within such a unit. The only references to constitutional authority are to the Louisiana Constitution of 1974 and its provisions relative to protecting and conserving the natural resources of the State and to limiting the right of ownership as subject to reasonable statutory restrictions and the reasonable exercise of the police power. Following a thorough consideration of the applicable state law, the Louisiana Supreme Court held that unitization, which creates rights and interests in a pool of hydrocarbons beyond the traditional property lines, effectively amends certain Louisiana private property laws in the interest of conserving the natural resources of the State and, in effect, of protecting private property interests, or "correlative rights," of non-drilling landowners.

As noted previously, the Louisiana Supreme Court did not deem it necessary to specifically consider in its ruling any of the federal

questions as to due process now raised by the Appellant. Instead, the decision turns upon an interpretation of state law, both constitutional and statutory, and the effect of that law upon property rights as created under the Louisiana Constitution and the Louisiana Civil Code. As is often stated, such property interests are not created by the Federal Constitution, but rather "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). In the present case, it is clear that the Louisiana Supreme Court found that any property interest involved was conditioned upon the limitations contained in the articles of the Louisiana Civil Code and in Article I, §4 of the Louisiana Constitution. In such cases, this Court will inquire only as to whether the decision of the state court rests upon a fair or substantial basis, and "if there is no evasion of the constitutional issue, ... and the nonfederal ground of decision has fair support, ... this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the state court." *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944).

As discussed, the opinion of the Louisiana Supreme Court principally involved a consideration of the extent and effect of the police power granted to the Commissioner of Conservation by the Louisiana Legislature to establish compulsory drilling units for the purpose of conserving the natural resources of the State and of protecting private property interests. The court noted that such power has been held to be a constitutional exercise of the State's police power, citing *Hunter Co., Inc. v. McHugh*, 202 La. 97, 11 So.2d 495 (1942), *appeal dismissed*, 320 U.S. 222 (1943). As noted therein, this Court has acted repeatedly to uphold various provisions of conservation statutes against similar constitutional attacks. *See Patterson v. Stanolind Oil & Gas Co.*, 305 U.S. 376 (1939); *Henderson Co. v. Thompson*, 300 U.S. 258 (1937);

Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932); *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8 (1931); *Walls v. Midland Carbon Co.*, 254 U.S. 300 (1920); *Ohio Oil Co. v. Indiana*, 177 U.S. 190 (1900). Thus, the Louisiana Supreme Court applied well-settled principles relative to what constitutes a proper and reasonable exercise of the police power.

It is clear from a survey of the jurisprudence that the Commissioner's designation of the unit well at a location that will achieve the purposes of the legislation is a constitutional exercise of the police power of the State to regulate the taking of natural resources and does not constitute a taking of property without due process of law. Under the traditional due process analysis employed by the courts, the statute in question must serve a legitimate state purpose and must be within the authority of the state to secure, preserve and promote the general health, welfare and safety of its citizens. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Berman v. Parker*, 348 U.S. 26 (1954). The purposes of the statute at issue here, the conservation of natural resources, the prevention of waste and the protection of correlative rights in the common pool, have all been held to be legitimate purposes for the exercise of the State's police power. In *Lilly v. Conservation Commissioner of Louisiana*, 29 F. Supp. 892 (E.D La. 1939), the court upheld the constitutionality of the Commissioner's power to set allowables for production, finding that the protection of correlative rights is a proper basis for the Commissioner's acts. Other cases have specifically recognized as bases for the exercise of the police power the conservation of oil and gas resources, the prevention of waste and depletion of such resources, and the promotion of maximum recovery of resources. *See, e.g., Sun Oil Co. v. State Mineral Board*, 231 La. 689, 92 So.2d 583 (1956), *appeal dismissed*, 353 U.S. 962 (1957); *Smith v. Holt*, 223 La. 821, 67 So.2d 93 (1953); *Crichton v. Lee*, 209 La. 561, 25 So.2d 229 (1946). In considering the constitutionality of various actions taken under the conservation statutes, the courts weigh the public interest served by the action and the individual right curbed by the Commissioner's order and nearly

always strike the balance in favor of the public interest, finding that private property rights must yield. *Trunkline Gas Co. v. Steen* , 249 La. 520, 187 So.2d 720 (1966); *Smith v. Holt*, *supra*; *Alston v. Southern Production Co.*, 207 La. 370, 21 So.2d 383 (1945).

The second inquiry of the due process analysis is whether the action taken under the statute is a reasonable means of achieving the legislative purposes. As discussed previously, the unitization of individually-owned interests and the designation of a unit well at an optimum location protect the correlative rights of all owners within the unit and prevent waste and the drilling of unnecessary wells. The Louisiana Conservation Act sets forth as the standard for the location of the unit well that it be located at an optimum point for efficient and economic drainage of the unit. However, the Commissioner may make such exceptions to the required location "as may be reasonably necessary where topographical conditions exist that would make such a location of the unit well unduly burdensome . . . ." La. R.S. 30:9C. This balancing of geological and topographical factors by the Commissioner insures that any landowner or leaseholder whose interest will be burdened by the location of the unit well will be afforded due process. The Appellant here was afforded due process by having the opportunity to present evidence and argument against the location of the Stone Well, and the records of the public hearings show that Appellant had notice of and was present or represented by his geologist at each of the hearings dealing with the unitization and location of the Stone Well. Further, the findings contained in the unit order show that the Commissioner did effectively balance the competing interests of the parties.

Actions far more intrusive on private property rights than the designation of a unit well located beneath an unleased owner's property have been upheld by the courts as valid exercises of the state's police power. In *Sun Oil Company v. State Mineral Board*, *supra*, a statute that authorized the State Mineral Board to execute mineral leases on lands owned in indivision by 500 or more persons for the benefit of all the owners, whenever any 50 or more of the co-

owners of the property petitioned the board to lease it, was held constitutional. The court in that case found:

> [I]t is patent that such rights are subordinate to the valid exercise by the state of its police powers. And it has long since been established that the state's police powers justify measures for the regulation of production of oil and gas and for the conservation of these valuable deposits .... Such a measure, designed to benefit the state and all the co-owners affected, is clearly a valid exercise of the police power, much the same as is an order of the Commissioner of Conservation establishing compulsory drilling units, and private rights succumb thereto.

92 So.2d at 588.

Similarly, in *Hunter Co., Inc. v. McHugh*, *supra*, the plaintiff contended that forcing it to combine its lease with land leased to others for the purpose of gas production and to share with them its pipeline and other marketing facilities, without compensation, was a deprivation of property without due process. The decision was appealed to the United States Supreme Court, which dismissed the appeal, stating:

> [T]he record presents no substantial federal question. We have held that a state has constitutional power to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among landholders of the migratory gas and oil underlying their land, fairly distributing among them the costs of production and of the apportionment.

320 U.S. at 227. The action upheld in the *Hunter* case, the forced sharing of production discovered and of production and marketing facilities constructed solely by the Hunter Company, is a far more severe intrusion on property rights than the forced acquiescence in the use of the subsurface of property for the drilling of the unit well.

Finally, the power of an administrative agency to designate a unit well location on the *surface* of an unleased tract within the unit has been expressly upheld by the Oklahoma Supreme Court. In *Texas*

Oil and Gas Corp. v. Rein , 534 P.2d 1277 (Okla. 1974), the court upheld a Corporation Commission order authorizing the drilling of a unit well on the land of an unleased owner, finding that the Oklahoma statute empowers the commission to establish the unit well at any location within the unit. The court found that the well location designation did not constitute an exercise of eminent domain, nor did it deprive the landowner of his property without due process of law. Thus, as indicated above, the courts have upheld much more drastic actions taken by the state to protect the correlative rights of landowners within the unit than that exercised by the Commissioner of Conservation in the instant case.

In summary, it is clear that the decision in this matter by the Louisiana Supreme Court was correctly rendered on the grounds stated therein. In addition, in numerous cases involving similar constitutional attacks upon state conservation statutes and actions taken by administrative agencies pursuant thereto, this Court has repeatedly acknowledged such statutes and actions as reasonable and proper exercises of the state's police power. More specifically, the Louisiana Conservation Act and other conservation measures taken by the Commissioner under its authority have been held to be legitimate exercises of the State's police power when subjected to constitutional due process challenges. Finally, administrative actions far more intrusive on private property rights than those in question here have been upheld by the courts as valid exercises of the state's police power. Thus, even considering the Appellant's arguments on their merits, this matter cannot be said to present a substantial federal question and, on that basis alone, should be dismissed.

D. THE JUDGMENT OF THE LOUISIANA SUPREME COURT IN THIS MATTER IS CLEARLY BASED UPON ADEQUATE NON-FEDERAL GROUNDS.

As previously discussed, the opinion rendered in this matter by the Louisiana Supreme Court must be seen as turning solely upon an interpretation of state law. As framed by the court in its ruling, the

specific legal issue presented was whether the Louisiana Conservation Act operated to supersede certain property concepts as embodied in the provisions of the Louisiana Civil Code. At issue here were the effects of, and possible conflict between, specific Louisiana statutes. A simple reading of that judgment leaves no question that the matter was properly determined upon a substantial and sufficient non-federal basis and, as noted previously, this Court has no jurisidiction to review the case and this matter should be dismissed.

In matters such as the present one, this Court will inquire as to "whether the asserted non-federal ground independently and adequately supports the judgment." *Abie State Bank v. Weaver* , 282 U.S. 765, 773 (1931). If the Court concludes that the state ground is both independent and adequate to support the judgment, "this court will not assume jurisdiction of the case", *Klinger v. Missouri*, 13 Wall. 257, 263 (1871), inasmuch as "our jurisdiction fails", *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). *See also Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945); *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908). The "independent and adequate state ground" rule is thus a corollary of the fundamental principle that the Court lacks jurisdiction to review matters of state law. That principle in turn reflects the Article III limitations on federal judicial power, as well as the jurisdictional restrictions imposed on the Court by 28 U.S.C. §1257.

In the instant case, the sole basis of the decision was one of construction of state statutes, and the matter cannot properly be the subject of either appeal or certiorari. Even if it could properly be said that the validity of a statute had here been sustained in the face of federal objections, the Supreme Court on appeal must accept the state court's construction of the statute and proceed to test the validity on that basis. *Kingsley Intern. Pictures Corp. v. Regents* , 360 U.S. 684, 688 (1959); *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509, 513 (1933). Where, as here, "there can be no pretense that the [state] Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to

any federal question, this Court accepts the decision whether right or wrong." *Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960); *Nickel v. Cole*, 256 U.S. 222, 225 (1921).

In summary, because the opinion of the Louisiana Supreme Court rested upon a determination as to the meaning and application of state law, this Court must be said to lack jurisdiction in this matter. The issue involved was one as to the effect of the Louisiana law relative to unitization upon certain principles of private ownership, and the resolution of a possible conflict between two bodies of state statutory law, with the resulting finding being that one effectively amended or superseded the other. The decision as rendered by the Louisiana Supreme Court was based only upon consideration of state law, both constitutional and statutory, without any reference to or determination of a federal question. Thus, because that judgment must be said to rest upon an independent and adequate non-federal basis, this matter should be dismissed.

E. THE QUESTIONS UPON WHICH THIS CAUSE DEPENDS ARE UNSUBSTANTIAL, THERE IS AN ABSENCE OF ANY CONFLICT OF OPINIONS, AND THE JUDGMENT RENDERED BY THE LOUISIANA SUPREME COURT IS SO OBVIOUSLY CORRECT AS TO WARRANT NO FURTHER REVIEW.

As demonstrated above, the decision rendered in this matter by the Louisiana Supreme Court did not specifically involve the consideration of a substantial federal question, and clearly rests on an independent and adequate non-federal basis. In addition, under any reasonable consideration of that opinion, it is clear that the court reached the correct result, both under the applicable law and the facts of this case.

All three Louisiana courts which have reviewed this case have concurred in the conclusions that Wainoco, as operator, complied with the rules, regulations, orders and permits of the Office of Conservation and that the Commissioner acted properly and fully

within his powers in all of his orders, rulings and permits. First, the orders and permits issued by the Commissioner authorized the Stone Well to be drilled at its present location and to be completed beneath the Appellant's property, and it is undisputed that the well was drilled in conformance and compliance with its permits, Order No. 1095 and 1016-B-2, and all applicable statewide orders, including Nos. 29-B and 29-E. Additionally, in Order No. 1095-B and 1016-B-3, the Commissioner found that the unit and unit well location were reasonable and appropriate and should be confirmed, and he refused to order the removal of the well. Therefore, Wainoco, as operator, complied with the terms of the permits and orders in conducting its operations for the drilling of the Stone Well and relied upon the authorization for such operations given to it, as operator, by the Commissioner.

Second, the Commissioner's authorization of the location of the well is in conformance with the authority in La. R.S. 30:10A of the Louisiana Conservation Act to compel the pooling of separate tracts and their development as a single, integrated unit, and with the duty under La. R.S. 30:9C to provide for the location of the unit well at the optimum position for the most efficient and economic drainage of the unit, regardless of the consent to that location or lack thereof by landowners or lessees. In fact, the Commissioner was dismissed as a party by the Trial Court and by the Court of Appeal, and with respect to the latter, the Appellant did not contest that dismissal by seeking review in the Louisiana Supreme Court.

Third, in reviewing the actions of the Commissioner and in judging the issue presented in these proceedings, the Court should consider not only the Commissioner's express authority, but the purpose and intent of the Louisiana Conservation Act: the prevention of waste; the avoidance of the drilling of unnecessary wells; the efficient and economic drainage of the unit; and the just and equitable sharing of the oil and gas in the pool. The process of compulsory unitization is designed to protect the correlative rights of all of the owners in a common pool from the unreasonable exercise of rights by any individual owner, and allowing one owner to block the

production of the common resources by withholding his consent to a provision of the unit orders and permits would frustrate the express purposes of the conservation statute. Thus, a ruling in favor of Appellant granting an injunction for the removal of the Stone Well would be counter to the public interest and would undermine the public policy of this State.

The Commissioner's power to unitize separately-owned tracts has eliminated the destructive and wasteful practice of drilling unnecessary and competitive wells that dissipate reservoir energy and reduce the amount of hydrocarbons ultimately recoverable from the pool. The exercise of that power necessarily has resulted in the infringement of individual rights of owners in the unit by prohibiting them from drilling wells on their own tracts, by forcing them to share production and equipment and by limiting the amount of hydrocarbons that can be produced, but has insured the correlative rights of each party to receive his just and equitable share of the oil and gas in the pool. The authority of the Commissioner to force pool and require development of separate tracts on a single unit irrespective of the agreement of the owners of those tracts and to designate a unit well at the optimum geological location that will afford economical and efficient drainage of the pool is equally necessary to protect correlative rights and to prevent waste. It is indeed an integral part of the statutory scheme of the conservation of natural resources in the State.

A contrary result such as Appellant seeks herein would allow one landowner within a unit to receive the economic benefits of unitization while preventing the unit from being produced in the most efficient and economical manner by arbitrarily withholding his consent to the location of the unit well beneath his property. Such a result would have an unfair and pernicious effect upon the correlative rights of the other owners of property within the unit. Almost every action of the Commissioner impacts property rights. The Commissioner's action in this instance is the least intrusive method for insuring maximum recovery of the unit reserves. The Appellant, who had sought to have the well drilled, who has contributed to its

cost, and who has been paid his share of the proceeds from the sale of production, is in no different posture than anyone with the right to drill for minerals on a tract of land, whether an unleased owner or lessee; the argument urged by him could be urged by any of them. The fact that the Appellant has not consented to the subsurface location of the well does not make him a special exception and should not permit him to invalidate the action of the Commissioner in enforcing compulsory unitization or to defeat the rights of the other owners within the unit.

Finally, though the issue involved in this matter was one of first impression to the Louisiana Supreme Court, that Court is not alone in deciding this case against the position urged by Appellant. In a case factually similar to the present one but involving a more substantial intrusion upon property rights, the Oklahoma Supreme Court reached the same result as that represented in the opinion of the Louisiana Supreme Court in the instant case. As already discussed, the Oklahoma Supreme Court in *Texas Oil & Gas Corporation v. Rein, supra*, upheld a Corporation Commission order authorizing the drilling of a unit well on the *surface* of a tract owned by an unleased and unconsenting owner, finding that the Oklahoma statute empowers the Commission to establish the unit well at any location within the unit. The court found that the well location designation did not constitute an exercise of eminent domain, nor did it deprive the landowner of his property without due process of law. The Oklahoma statute challenged in the case is virtually identical in effect to the Louisiana statute, although not as explicit in authorizing the Commission to designate the unit well location without regard to the consent of the owners. In construing the statute and the action sought to be exercised thereunder, the court held:

> We conclude [the statute] authorizes the Commission to establish the well location at any location upon the spacing unit and that [the statute] authorizes the Commission to pool the working interests within the spacing unit and designate an operator to drill and operate the well at the designated well location.

> To hold otherwise would frustrate the intent of the Act because the owner desiring to drill would not be entitled to do so unless he held a lease covering the well location designated by the Commission.

Of course, the action upheld in the *Rein* case was the designation of the surface location of the unit well on an unleased tract owned by a non-consenting party, whereas in this case, the specific action complained of as trespass is that the Commissioner authorized the drilling of the unit well into the subsurface of the Appellant's tract. As noted, the Louisiana Supreme Court cited the *Rein* decision and agreed with the Oklahoma Supreme Court in its holding. *Nunez v. Wainoco Oil & Gas Co.*, 488 So.2d 955, 963 (La. 1986).

V.

CONCLUSION

For the aforegoing reasons, it is respectfully submitted that this appeal be dismissed or the decision of the Supreme Court of Louisiana be affirmed, or, treating the papers as an application for a writ of certiorari, that the writ be denied.

Respectfully submitted,

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October 10, 1986

* Counsel of Record

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date mailed three true and correct copies of the above and foregoing Motion of Appellees to Dismiss or Affirm to Mr. Adam G. Nunez, in proper person, at 1908 Maplewood Drive, Sulphur, Louisiana 70663, by depositing same in the United States Mail, postage prepaid and properly addressed. Lafayette, Louisiana, this 10th day of October, 1986.

Lawrence P. Simon, Jr.

LAWRENCE P. SIMON, JR.

6 DISTRIBUTED

OCT 29 1986

Supreme Court, U.S.
FILED
OCT 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86,302

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

ADAM G. NUNEZ,

Applicant,

-vs-

WAINOCO OIL & GAS COMPANY, TIDEWATER REALTY, INC., TIDEWATER BARGES, INC., WILSHIRE OIL & GAS COMPANY OF TEXAS, SOUTHERN CROSS LIMITED OF COLORADO, C.D.C. PRODUCING COMPANY, WILLIAMS EXPLORATION COMPANY, SOUTHPORT EXPLORATION INC., THE JOHN W. MECOM COMPANY, T. KEITH MARKS, DONALD F. TODD, CYNTHIA TODD HENDON, RONALD E. MARTIN, GUY V. LAND, REMUDA CORPORATION, LAWRENCE BARKER, JR., H. T. FREEMAN, Trustee, JOE RAMOS, Trustee, WILLIAM W. WILSON, Trustee, A.K. MITTELSTAEDT, Trustee, ROBERT E. MILLER, IRVIN POLLACK, JOHN C. KINARD, DAN W. WILLIAMS, ANDREW R. FISH, HARRY DERNICK, DERNICK RESOURCES, INC., MARINEX PETROLEUM COMPANY, ROGER AND COMPANY, WYNN & ASSOCIATES, EXCHANGE OIL & GAS CORPORATION, LEON COUNTY DEVELOPMENT COMPANY, INC., and CAMERON DEVELOPMENT COMPANY, INC., COMMISSIONER OF CONSERVATION OF THE STATE OF LOUISIANA

Respondants

APPEAL FROM THE SUPREME COURT OF LOUISIANA

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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ARGUMENT

I. Statement about Argument.

Appellees filed a Motion to Dismiss or Affirm. In that motion, Appellees primarily seek to convince this Honorable Court that Appellant should not be granted a Hearing, either in this form of an Appeal or in the form of a Writ. Their thrust has little or nothing to do with the right guaranteed to the landowner by the 5th and 14th Amendments to the U. S. Constitution, nor with the violation of Article 1 Section 4 of the Louisiana Constitution nor of the statutory and jurisprudential Law of the U.S. and of Louisiana. They seek primarily to eliminate any real consideration of the property rights of Appellant. The following is presented in rebuttal of Appellees Motion.

II. Jurisdiction Question

Contrary to the contention of Appellent that the State Supreme Court must have considered the validity of a state statute as against constitutional attack or that the opinion show that the State Court passed upon a federal question inpacting on the facts of the case, 28 U.S.C. 1257 provides very clearly that which is required is that such questions are drawn before the U.S. Supreme Court, and basically that the State Court decision upheld the State Law as contrasted to the U.S. Constitution or laws. If this were not true, then all that a State Court would need to do to prevent a Constitutional question from being heard or a citizen from realizing and receiving the protection, benefits, and guarantees of the Constitution or Federal Law would be for the State Court not to state anything about the Constitution or Federal Law in its opinion. How easy this would be. Then we could have 50 different opinions, all opposite to the Constitutional

guarantees. There would not even have to be a clandestined plan, it could happen without intent.

The parties to the suit cannot force the Court to consider or to include in its discussion any particular question. How often we have seen a decision rendered based on one of several issues raised, and the other issues not even mentioned. Or, factually, how often we have seen decisions based on a question or point not even considered by the parties to the action. To say that this appeal (or writ, if so) should not be considered because the Federal questions were not expressly passed on by the Louisiana Supreme Court would be the ultimate deprivation of the rights provided for and guaranteed by the U. S. Constitution.

Such a thing would be the recognition and approval of the absolute authority of the States and the courts of the various states to dictate and approve and have en-

forced the states laws dehors the Constitution and the supremacy of the Federal Laws. This cannot be. Such a suggestion as a basis to deny this appeal (or Writ) would truly deprive a person of his Constitutional guarantees.

III. Was Federal Question Raised

As to whether or not the federal question was raised, your Honors need only refer to pages 19 through 30 of the Jurisdictional Statement filed by Nunez to realize that the federal question was raised and repeatedly raised in every Court. Possibly Appellees could state that Appellant's Petition and Amended Petition, and later his Briefs were inadequate to force the State Courts to render their decision based on the Federal question, however, just as the writer cannot force this Honorable U.S. Supreme Court to render a decision in favor of Appellant, there was no way that Appellant could force the State Courts to base their decision on any particular thing--be that State or

Federal Law. All Appellant could do was present, and Appellant did present the federal question, as the writer is satisfied this Honorable Court will conclude upon examining pages 19 through 30 of Appellant's Jurisdictional statement.

IV. Substantial Federal Question

As to whether or not there is a substantial federal question warranting review by this Honorable Court, that is a matter for you to decide. It is respectfully submitted, however, that there is a substantial federal question as was presented by Appellant in his Jurisdictional Statement.

V. Question Never Before Presented to This Court

The issue presented by this action has not been considered by this Court before. The closest opportunity this Court had was the case of Texas Oil and Gas Corp. v Rein 534 P 2d 1277 (Okla 1974) in which Oklahoma Courts decided the Commissioner was empowered to create units and to permit wells on

non-consenting landowners. But in the Rein case, the Commissioner permitted a well on the non-consenting landowner. In Nunez v Wainoco the permit was not to drill on Nunez land, but, rather on adjoining land owned by Stone et al. The Louisiana Supreme Court based its decision entirely on the fact that unitization had occurred through the Commissioner and did not even consider the fact that no permit--no authority whatsoever had ever been granted to drill into Nunez land.

It is respectfully submitted that the decision in the Rein case can be justified on the basis of Oklahoma Conservation Statutory Law which provides:

> "(D) For the purpose of this act, the owner or owners of oil and gas rights, in and under a tract of land shall be regarded as a lessee to the extent of 7/8ths interest in and to said rights and a Lessor to the extent of the remaining 1/8th interest therein".

This provision of the statute was later interpreted in Barton v Cleary Petroleum Corporation 566 P2 462 to create a relation-

ship which is "in effect" that of a lessor--lessee between the unit operator and the owner of the unleased land to the extent of one-eighth (1/8) of the owner's undivided interest. The Barton Court held that this relationship would take affect from the moment of the creation of the unit encompassing the unleased unit. As a result, although an owner may not have entered into a lease agreement covering his land, he is faced with a statutorily imposed lessor--lessee relationship with the unit operator to the extent of one-eighth (1/8) of his interest. This is significant when analyzing the issue at hand, because from the moment a unit is created, the unit operator has the statutorily created contractural right of the Lessee, including the right to enter upon and drill on any unleased tract in the unit. When coupled with the fact that Oklahoma recognizes the right of a co-tenant to explore for hydrocarbons

without the consent of his co-tenant, it is realized that the unit operator has the right to drill on any unleased tract in the unit because he has been granted, in effect, a lease on an undivided one-eight (1/8) interest in all such tracts.

Therefore, the power that the Commissioner exercised in the Rein case actually was no "power" at all. The designation by the Commissioner of the best location to drill does not give the operator power to enter and drill on unleased land, because from the moment of unitization, there was "in effect" no unleased land left. The Commissioner, by designating the well on Rein's tract, was merely allowing the operator to do what he already had the statutorily created, contractual authority to do.

This key provision in the Oklahoma statute is absent from its' Louisiana counterpart precluding a similar finding in Louisiana. However, even with the addition of the

Oklahoma provision, a synonymous result would not be possible since Louisiana law does not recognize the right of one co-owner to drill without the consent of his co-owners (see LSA-R.S. 31:164, 31:166, 31:177).

VI. State Law must be complied with, but Federal Law must prevail over State Law.

To an extent the various states (Louisiana included) do regulate their natural resources. However, Federal regulation prevails. One of many, many examples is when the Federal Power Commission, or whatever the federal agency was called, controlled the price of the sale of gas, so that "old gas" sold for 37¢ while production from new wells was selling in Louisiana for something like $8.00. So we do realize, and it is obvious that Federal law does and must control.

The greater importance of this Honorable Court considering this Appeal is the fact that in this case, we have a State agency, the Commissioner of Conservation, exercising "authority" it was never specifically and

expressly granted (see the Opinion in Nunez v. Wainoco, 477 So2 1149) in a manner contra to empowering statute (LSA R.S. 30:9(c)) (See Jurisdictional Statement at page 40 and following) but still, in so exercising that "authority", if the opinion of the Louisiana Supreme Court is to stand, taking property from the landowner--Appellant, contrary to the U. S. Constitution, the Constitution of Louisiana, and all statutory and jurisprudential law existing before Nunez v. Wainoco, and contrary to the statement of the Commissioner of Conservation and the State of Louisiana, that no authority was ever granted to Appellant to drill subsurface into Nunez land.

The various states (Louisiana) can and should regulate the state's natural resources. But that regulation must be in accordance with the Law of the state and not repugnant to the guarantees to the landowners of the 5th and 14th Amendments to the U.S. Constitu-

tion. A state agency can not be permitted to exercise power and authority not expressly and specifically granted to it (see Nunez v Wainoco 477 So2 1149), especially when that sought to be exercised by the State agency cannot be exercised by the State because it is repugnant to the U.S. Constitution, 5th and 14th Amendments. Further, even if the acts of the State Agency, or even of the State were authorized by State Law, if that State Law is repugnant to the U. S. Constitution as is in Nunez v Wainoco , as interpreted by the Louisiana Supreme Court, that action cannot be allowed to stand.

VII. Louisiana Courts Considered Only State Law.

As stated by Appellant and and as clearly recognized by Appellees (repeatedly in their Motion to dismiss or affirm (pg. 15, 16, 17 and in particular on page 12)

> "The decision rendered by the Louisiana Supreme Court simply does not mention, discuss, or pass upon any federal Constitutional questions and the matter was clearly decided solely on the basis of state law."

The Louisiana Courts did not even consider--and if they did consider, they failed to state anything whatsoever relating to the provisions of the 5th and 14th Amendments to the U.S. Constitution and the protection guaranteed to the landowner.

This is the basis of this appeal--or Writ if you will. The realization and maintaining of Appellants property rights as guaranteed by the Constitution and Federal Law must be considered and Appellant's property rights must be protected as against the unauthorized, improper acts of the State Agency.

VIII. There was no due process afforded Nunez in the taking of Nunez Property Rights.

The Commissioner created a unit without permitting a well in its Order in violation of LSA R.S. 31:9(c). The creation of the unit was within the statutorily directed mandate to the Commissioner. But the Commissioner did <u>not</u> permit a well to be drilled on Nunez

land--not in the Order relied on by Appelles, nor at any other time in any manner, even though the law of the State of Louisiana requires that a permit be secured and when secured, the well must be drilled on and into the property on which the well is permitted.

The Louisiana Supreme Court's decision confirms that creating the unit alone authorizes drilling into Nunez land--despite the Law of the State of Louisiana that states the contrary. That decision takes from Nunez the protection of the 5th and 14th Amendments by judicially legislating that unitization alone is sufficient to take property rights from a non-consenting landowner when, in fact the statute does <u>not</u> so provide or authorize in direct disregard of the constitutional protection guaranteed to landowner. This taking--this expanding by the Louisiana Supreme Court of the statute --or if contrary to the belief of the writer, the statute does

authorize the taking of property rights from a non-consenting landowner, the State statute that so authorizes is opposite the guarantees by the U.S. Constitution, 5th and 14th Amendments.

IX. Conclusion.

This is the first time that the questions and issues raised by this action have ever been presented to this Honorable Court. It is a matter of/for first impression. It will serve as a guide for like actions and a determination of landowners property rights in the future. A review should and is respectfully submitted, must be granted, as there is most definitely a serious question of the violation of the protection of the landowners property rights guaranteed by the U.S. Constitution, 5th and 14th Amendments, Louisiana Constitution, Article 1 Section 4, and all Statutory and Case Law existing before Nunez v Wainoco.

It is respectfully submitted that for

the reasons, and based on the Constitutional, statutory and jurisprudential law presented in the Jurisdictional Statement and in this Brief, an Appeal, or in the alternative, Writs should be granted.

Respectfully Submitted:

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STATE OF LOUISIANA : AFFIDAVIT OF FILING
PARISH OF CALCASIEU : AND OF SERVICE

BEFORE ME, the undersigned Notary Public, duly commissioned and qualified within and for the State and Parish aforesaid, personally came and appeared

ADAM G. NUNEZ

who, being by me first duly sworn, deposed and said:

THAT appearer is an attorney at law and is appealing to the United States Supreme Court in proper person in the matter of Adam G. Nunez vs. Wainoco Oil & Gas Company et al;

THAT the Opposition to Motion to Dismiss or Affirm relating to this appeal is being filed with the United States Supreme Court by depositing same in the United States Government mail and/or United States Post Office with first class postage prepaid and properly addressed to the Clerk of the United States Supreme Court within the time allowed for filing, the depositing of said Opposition to Motion to Dismiss or Affirm in the United States Government mail taking place this 25 day of October 1986.

THAT service of this Opposition to Motion to Dismiss or Affirm is made upon Wainoco Oil & Gas Company, Tidewater Realty Inc., Tidewater Barges, Inc., Wilshire Oil & Gas Company of Texas, Southern Cross Limited of Colorado, C.D.C. Producing Company, Williams Exploration Inc., the John W. Mecom Company, Cynthia Todd Hendon, Ronald E. Martin, Guy V. Land, Remuda Corporation, Lawrence Baker, Jr. H. T. Freeman, Trustee, Joe Ramos, Trustee, William W. Wilson, Trustee, A. K. Mittelstaedt, Trustee, Robert E. Miller, Irvin Pollack, John C. Kinard, Dan W. Williams, Andrew R. Fish, Harry Dernick,

Dernick Resources Inc., Marinex Petroleum Company, Roger & Company, and Wynn & Associates through their Counsel of Record upon Liskow & Lewis, attorneys at law, attention: Lawrence Simon, Robert Jordan, Kerry N. Massari and Martha Q. Thomas at post office box 52008, O.C.S., Lafayette, Louisiana 70505, upon Exchange Oil & Gas Corporation, their Counsel of Record, Peter Monrose, Esq., at 24th Floor, 1250 Poydras Street, New Orleans, Louisiana 70112, upon Leon County Development Company Inc., and Cameron Development Company, Inc. through their counsel of record upon John McCollam, Esq., 2450 Pan American Life Center, Suite 2450, New Orleans, Louisiana 70130 and Edmund McCollam, Esq. at Post office box 1548, Houma, Louisiana 70360, and upon the Department of Conservation, State of Louisiana, through its Counsel of Record, Veil David Devillier, at post office box 1149, Eunice, Louisiana 70535, said service being made by depositing copies of said Opposition to Motion to Dismiss or Affirm in the United States Government mails, sufficient postage attached thereto, properly addressed to said counsel who represents all parties to these proceedings, except appearer, who does hereby certify to service being accomplished as aforesaid.

All of the above is accomplished this 29 day of October 1986.

SWORN TO AND SUBSCRIBED before me, this 29 day of October 1986, in Sulphur, Calcasieu Parish, Louisiana.

NOTARY PUBLIC